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In The Supreme Court of the United States

October Term 1998

JOSEPH P. STICH,
Petitioner,

v.

RON ANGELONE, Director,
Virginia Department of Corrections,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether the Fourth Circuit Court of Appeals properly affirmed the District Court's ruling that there was no violation of *Brady v. Maryland* and its progeny?

II. Whether Stich's rights under the Sixth Amendment's Confrontation Clause and the Sixth Amendment's Compulsory Process Clause were violated?

III. Whether Stich's counsel committed multiple errors beyond the two errors found by the District Court and affirmed by the Fourth Circuit Court of Appeals and whether those multiple errors should be considered cumulatively in assessing prejudice under *Strickland v. Washington* and its progeny?

IV. Whether Stich's counsel's multiple errors were so numerous and so egregious that counsel did not give Stich the assistance mandated by the Sixth Amendment so that prejudice is presumed under *United Sates v. Cronic* and its progeny?

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OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals and the United States District Court for the Western District of Virginia were unpublished opinions.

This matter has also been before state courts. Stich appealed his state trial court convictions to the Virginia Court of Appeals. His Petition for Appeal was denied on October 19, 1994. He then appealed to the Supreme Court of Virginia. That Court denied his Petition for Appeal on March 20, 1995. On April 3, 1995, he filed a Petition for Habeas Corpus in the Circuit Court of Shenandoah County, the original trial court. On January 24, 1996, that Court summarily dismissed his Petition without giving him a hearing on the merits. He appealed the dismissal to the Supreme Court of Virginia. On July 29, 1996, the Supreme Court of Virginia rejected his Petition for Appeal. Stich then filed a petition for a writ of habeas corpus in the U.S. District Court for the Western District of Virginia. No other petition for habeas corpus or petition for appeal has been filed except those listed above. All of the state court decisions were unpublished.

JURISDICTIONAL STATEMENT

The Petitioner, after being heard by the Fourth Circuit Court of Appeals, asks this Court for a Writ of Certiorari. Jurisdiction of this Court is proper under 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment provides in pertinent part: ". . . or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

"Yes, Sir, I don't believe that anybody should, on the word of Mr. [Tim] Smith, should be convicted of any crime." Tr., 87, 13-15. With this simple statement, Houston Miller, a Virginia judicial officer, a Magistrate, well acquainted with the Virginia criminal justice system put his finger on why Stich's criminal trial was unfair and the result unreliable. Stich was convicted on the sworn testimony of a pathological liar, Tim Smith, a person who has no respect for the truth and whose life has been marked by a myriad of criminal and fraudulent activities, including several bank robberies. Yet, the jury that tried Stich heard nothing of Smith's background because Stich's defense counsel, William B. Allen, III, was unprepared to defend Stich to the extent required—that of a competent defense attorney in Virginia. In a nutshell, Allen presented an unorganized, unprepared, incompetent defense that led inexorably to the unreliable result.

Allen's errors rival Smith's criminal and fraudulent activities in number and scope. Allen failed to attack Smith's credibility by obtaining copies of Smith's criminal record, did no factual investigation, no legal research, did not prepare witnesses for direct and cross examination, and did not subpoena critical expert witness. Simply stated, Allen did nothing. Stich will discuss Allen's failures below

In August, 1994, Stich was convicted by a jury in the Circuit Court of Shenandoah County in Woodstock, Virginia, of four counts of child sexual abuse, for touching the genitals of his two infant daughters. The convictions were for two counts of aggravated sexual battery under Va. Code § 18.2-67.3 and two counts of sodomy under Va. Code § 18.2-67.1. On February 10, 1994, Stich was sentenced to a total of 24 years in the penitentiary in accordance with the

jury verdicts. He is currently serving that sentence at the Coffeewood Correctional Center in Mitchells, Virginia.

The Commonwealth's case was dependent on the testimony of Tim Smith (Smith) who supposedly saw Stich abuse his daughters. Smith had been a friend of Stich's and a member of a religious commune that Stich led in Woodstock. The commune included, *inter alia*, besides Stich and Smith, Nancy Stich, Stich's wife and Jenny Rogers who Stich claimed as a "wife" with the consent and approval of Nancy.

Smith had financed and praised Stich's book, *Conversations with the Lord God of Hosts*, an explication of Stich's and Smith's religious beliefs grounded on the theology of the Church of Latter Day Saints. Smith was a convicted bank robber. He lied during Stich's preliminary hearing about his criminal record. Smith was also a notorious liar and cheat, well known in the Shenandoah Valley for his fraudulent activities.

Stich retained William B. Allen, III, Esquire (Allen) of Woodstock as defense counsel. Allen's failures as defense counsel are part of the grounds for Stich's petition for Certiorari. The other ground is the failure of the Commonwealth Attorney of Shenandoah County, William Logan (Logan) to reveal Smith's criminal record and his nefarious business activities to Allen.

In the preliminary hearing, the assistant Commonwealth Attorney facilitated Smith's untruthfulness about his criminal record by objecting to Allen's attempt to find out from Smith about the record. The Assistant Commonwealth Attorney also did not inform the juvenile court about the record in the discussion that ensued as a result of the objection.

Allen, Stich's defense counsel, filed a *Brady* request in both the Juvenile and Circuit Courts. The request in the Circuit Court was filed on a form provided by the Court. In both requests defense counsel requested all *Brady* material including specific requests for the criminal record of any

Commonwealth witness. The Commonwealth Attorney never fully responded to the requests.

At Stich's preliminary hearing, Smith perjured himself when he testified that he had "absolutely no criminal record whatsoever." Tr., Preliminary Hearing., 109, 5-9. The Assistant Commonwealth's Attorney supported Smith's untruthful answer. Id. When pressed by the Court and Stich's defense counsel, Smith admitted that he "had gotten into some trouble when I was young . . . ., and I do not know whether it ended in a conviction or whatever happened. I know I had the charges dropped." Id. 110, 9-14. Smith's answer was untruthful. The charges were not "dropped." Smith, in fact, had been convicted in the Circuit Court of the City of Charlottesville of armed bank robbery. Smith aided and abetted by the Commonwealth Attorney had deflected the defense away from Smith's criminal record. It was never mentioned in the trial in August.

Smith also had a history of shady business deals including instances of fraudulent activities involving blatant untruthfulness and stealing. His reputation in the Shenandoah Valley was that he was a liar, who could not be trusted, hence Magistrate Miller's concern expressed above. Miller was one of Smith's victims. Smith's business activities were known by the Shenandoah County Department of Social Services (DSS) and should have been known to the Commonwealth Attorney under the affirmative duty of inquiry of *Brady* and *Kyles,* below.

That Stich's trial was a "credibility case" is beyond caveat. Allen, Tr., 107, 20-25. Allen and Peter M. Baskin, Esquire, a well-known Virginia criminal defense attorney with about 30 years experience trying criminal cases in Virginia from child abuse cases to capital murder cases Tr., 142, 20-24, agreed that without Smith the Commonwealth had no case. Mr. Baskin testified as an expert witness for Stich at the federal habeas hearing.

The credibility part of Stich's criminal trial was a defense counsel's dream come true. Not only was the state's critical

witness a convicted bank robber but the witness had a reputation throughout the Shenandoah Valley as a liar and a cheat. And the witness had taken his untruthfulness into the courtroom when he had lied under oath during the preliminary hearing about his bank robbery conviction a scant three months before the criminal trial. There is no question that Allen could have confronted Smith with his bank robbery conviction. Smith's record was not a "juvenile record," a record of the juvenile court. Smitn was 17 years old at the time. But he was convicted as an adult in the Circuit Court of the City of Charlottesville. That Smith's criminal record was easily accessible was proven by Stich's current counsel who obtained certified copies of the record "in a day." Jenny Rogers, Tr., 220, 11-25.

In order to avoid being prolix, the foregoing has been restricted to the basic facts. Additional key facts are incorporated into the argument. "Tr." Refers to the transcript of the habeas hearing in the District Court. References to other transcripts such as the trial transcript in the Circuit Court of Shenandoah County will be identified as they occur.

SUMMARY OF THE ARGUMENT

The result of Stich's criminal trial is unreliable because the Commonwealth Attorney of Shenandoah County did not reveal to defense counsel Tim Smith's criminal record and other information about Smith's fraudulent and dishonest business activities. The result of the trial was also unreliable because Stich's defense counsel was ineffective in that counsel did nothing to prepare the case for trial.

This matter raises serious constitutional issues regarding the scope of a prosecutor's duty to inquire and about how extensive a criminal defense counsel's ineffectiveness must be before prejudice results to the criminal defendant. The violations of *Brady* and the number, nature, and scope of defense counsel's failures cast not only doubt on the reliability of the guilty verdicts but on the fairness of the

trial. In particular, this matter raises the issue never addressed by this Court: whether the multiple errors of defense counsel can be considered cumulatively for their collective prejudicial effect, or whether each individual failing of defense counsel must by itself standing separately be shown to have prejudiced the defendant to the extent that each individual failing made the outcome of the criminal trial unreliable? See App. 12, *et seq.*

There is a difference of opinion among the Courts of Appeals over the cumulative versus separate issue. Stich will argue below that in a multiple error case like this the cumulative impact of the errors must be assessed. Therefore, the District Court and the Fourth Circuit Court of Appeals committed reversible error by adhering to the separate standard. Stich also argues that because his defense counsel did nothing, that is, he did not prepare for trial to the extent that counsel did not render any assistance during the trial, prejudice should be presumed and the fairness of the trial and the reliability of the verdicts doubted without a specific showing of prejudice by Stich. See App. 12, n.3 where the District Court judge states that defense counsel "did perform haphazardly and even incompetently at times."

REASONS FOR GRANTING THE WRIT

I. *BRADY* AND *KYLES* AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSE A DUTY OF AFFIRMATIVE INQUIRY ON PROSECUTORS. THEREFORE THE COMMONWEALTH ATTORNEY HAD A DUTY TO INVESTIGATE SMITH'S CRIM-INAL RECORD AND HIS NE-FARIOUS BUSINESS DEALINGS AND TO REVEAL WHATEVER INFORMATION ABOUT THE CRIMINAL RECORD AND THE OTHER ACTIVITIES THAT WAS OBTAINED

A government witness's credibility is a central issue in a

criminal trial and any information regarding credibility, not just convictions, must be revealed to the defense. *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994); *Giglio v. United States*, 405 U. S. 150, 154 (1972).

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), this Court again emphasized that the good or bad faith of the prosecutor is irrelevant when *Brady* material is involved. 115 S.Ct. 1565 citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Moore v. Illinois*, 408 U.S. 786, 795-795 (1972). Even favorable evidence that was "never requested, or requested only in a general way" is within the stricture of *Brady*. *Kyles* at 1565 citing *Agurs v. United States*, 427 U. S. 97, 108 (1976).

The test is not a sufficiency of evidence. *Kyles* at 1566, n. 8. Where *Brady* material is involved the harmless error doctrine does not apply. Id. The suppression of *Brady* material "necessarily entails the conclusion that the suppression must have had a 'substantial and injurious effect or influence in determining the jury's verdict'" Id, citing *Brecht v. Abrahamson*, 507 U. S. 619, 113 S.Ct. 1710, 1712 (1993).

Most importantly for Stich's case, the Court reiterated that the "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police." *Kyles* at 1567. The Court was reiterating settled principles of federal constitutional law involving the interpretation of *Brady* by federal appeals courts, which have been uniformly clear that a prosecutor has a duty to search files that are not within the immediate control of the prosecutor's office; a duty that until *Kyles* had not been recognized in Virginia. See, e.g., *United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("a prosecutor's office cannot get around *Brady* by keeping itself in ignorance or compartmentalizing information about different aspects of a case"); *United States v. Perdomo*, 929

F.2d 967, 970-71 (3rd Cir. 1991). See also *Pennsylvania v. Ritchie*, 480 U. S. 39, 57 (1987).

Kyles made explicit that prosecutors, federal and state, have a federal constitutional "affirmative duty of inquiry." The pre-*Kyles* federal appellate cases are instructive in setting the parameters of that duty. See *Brooks*, above, 966 F.2d at 1503; *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975) (*en banc*). The test as to whether *Brady* has been complied with is an objective one and "the rule is framed in a way that permits its application to facts of which the prosecutor is ignorant." *Brooks*, 966 F.2d at 1502.

Part of this duty of inquiry holds a prosecutor responsible for information in files maintained by government agencies "closely aligned with the prosecution." *United States ex rel v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (information in Post Office file). In this matter, the Commonwealth attorney's office was "closely aligned" with DSS. See *Ritchie*, above.

This duty in a case like Stich's involving child abuse extends to DSS. Thus Mr. Logan's statements that he fulfilled his duty under *Brady* by searching the computer files of Virginia for Tim Smith's conviction for bank robbery simply does not meet the federal constitutional standards emphasized in *Kyles*. In Stich's case the *Brady/Kyles* duty of Mr. Logan extended beyond the confines of his office to DSS and the apparatus of the government of the Commonwealth of Virginia. And *Brady/Kyles* mandated that Mr. Logan reveal to the defense information concerning Smith's nefarious and fraudulent business activities—information which impugned Smith's credibility.[1]

The Virginia Court of Appeals in *Harrison v. Commonwealth*, 12 Va. App. 581, 405 S.E.2d 854 (Va. App. 1991) in *dicta* came close to recognizing this duty of inquiry,

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[1] Liz Hutchinson, a DSS social worker, told Nancy Stich that DSS "knew everything" about Smith.

"This is no excuse; the Commonwealth is not relieved of the discovery responsibilities because it fails to make reasonable inquiry of the police concerning the evidence it will use to prove its case," 405 S.E.2d at 857, a narrow interpretation impugned by *Kyles*.

What is beyond caveat in Stich's case is that: (1) Mr. Logan (the Shenandoah County Commonwealth's Attorney) knew about Smith's criminal record; (2) that his office misled defense counsel at the preliminary hearing when Mr. Allen tried to question Smith about his record and the Assistant Commonwealth Attorney objected; (3) Mr. Logan did not reply to defense counsel's *Brady* request in this Circuit Court; (4) Mr. Logan knew or was charged with the knowledge of Smith's criminal conviction and fraudulent business activities in so far as they were known by DSS and other agencies of the Commonwealth; and (5) Mr. Logan did not fulfill his affirmative duty to learn about Smith. In effect Mr. Logan adopted a "see no evil, hear no evil" attitude.

The State of Louisiana in *Kyles* urged this kind of attitude. The Louisiana prosecutor did not know about some of the favorable evidence until after trial. *Kyles* at 1568. Nevertheless, prosecutors are still responsible for disclosure for "any argument for excusing a prosecutor" from disclosure "boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." Id.

In his Opinion Letter, the state trial judge opined that Smith's bank robbery conviction was of little value to the defense because it would have been used for a "general attack" on Smith's credibility. Opinion Letter at 6. That statement is wrong. First a witness's inconsistent statement under oath can always be attacked. In the preliminary hearing Smith had lied about his criminal record. See above. Second, Smith and Stich were members of a religious group led by Stich. Smith was becoming increasingly jealous of Stich particularly after Stich's book, *Conversations with the*

Lord God of Hosts, was published. Smith hoped to replace Stich as the group's leader; a not uncommon occurrence when theological differences combine with jealousy. Smith had every reason to lie to remove Stich as the group's religious leader. Third, the constitutionally protected right of cross-examination, subsumed within the right of confrontation includes the right "to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S.39, 51 (1987).

Magistrate Judge Conrad cited Virginia law also cited by the state trial court judge that the juvenile record could not be used for a general attack on Smith's credibility. App., 41. But Judge Conrad and the state trial court judge neglected a critical point. Tim Smith had flat out lied about his criminal record at the preliminary hearing. He denied having any record. Smith's perjury put defense counsel in an enviable position. He could attack Smith's credibility with the prior inconsistent statement and get Smith's criminal record before the jury even without having it introduced into evidence. And, defense counsel did not have to use the criminal record in a "general attack" on Smith's credibility. Smith by his perjury at the preliminary hearing had opened the door to the use of his criminal record. Moreover, Smith's dishonest business dealings could also have been used to show a pattern of dishonesty.

Also the state trial court judge cited by Judge Conrad implied that Smith's criminal record which was fifteen years old at the time of Stich's trial was inadmissible because of remoteness. The law in Virginia is well settled that "Unlike the Federal Rules, Virginia's evidence law places no time limitation on the use of prior convictions to impeach a witness." C. Friend, *The Law of Evidence in Virginia*, 4th ed., § 4-2(f) citing *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). Professor Friend continues that the time of the conviction goes to its weight, not its admissibility. Id citing *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991). Note that Smith's conviction was not a juvenile

conviction. He was tried as an adult in the Circuit Court of the City of Charlottesville.

Virginia has defended itself against the *Brady* charge by claiming that Stich knew about Smith's conviction. Stich and the members of his religious group had heard Smith brag about robbing several banks and in fact, Smith had robbed at least two banks. The group dismissed Smith's statements as part of his usual ego-fueled braggadocio and his general untruthfulness. There is a distinction between robbing a bank and a conviction for bank robbery. That someone did or did not rob a bank is difficult to prove particularly someone like a con artist like Smith who could be expected to deny bragging about bank robberies. A bank robbery conviction is irrefutable evidence from a court.

It is inconceivable that Mr. Logan, or any prosecutor, would not discuss the criminal convictions of a witness with the witness. Such a conversation should be at the head of a prosecutor's checklist for trial. The conversation should include any "negatives" about a witness's credibility such as the nefarious business activities of a witness like Smith. If Mr. Logan did not discuss these subjects with Smith and instead blithely relied on the Virginia Criminal Records Exchange then he violated the spirit and letter of *Brady*. Mr. Logan has claimed that he did all that he was required to do– he checked the Virginia Criminal Records Exchange. Nothing showed up. Mr. Logan "compartmentalized" his case and kept himself in ignorance. Stich's defense looked to the Commonwealth to comply with *Brady*. Instead the defense met with obfuscation by the Commonwealth. Had the Commonwealth Attorney undertaken his duty of affirmative inquiry and not deflected Stich's defense counsel from pursuing Smith's criminal record during the preliminary hearing, Smith would have been confronted with his conviction at trial, which is what *Brady* and the Due Process Clause mandate.

Smith's nefarious business activities may have been of more value to the defense than his criminal record. The

business activities of Smith that Stich's current counsel learned about include numerous instances of fraud, which, of course, go to the heart of his credibility. DSS and the Commonwealth Attorney knew or they should have known with "affirmative inquiry" about these activities and should have shared the information with the defense.

The issue of the *Brady* material was doubly adverse to Stich. The Commonwealth Attorney did not fulfill his obligations under *Brady* and its progeny. Then, Stich's defense counsel compounded the failure of the Commonwealth Attorney by not doing the factual investigation required of all defense counsel so that the factual issues of Smith's credibility noted above, the theological differences between Smith and Stich and Smith's jealousy of Stich were never fully developed. Had these issues been developed together with proper legal research then Smith's bias and his motive could have been attacked, classic ground for effective cross-examination.

II. STICH'S RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE AND THE SIXTH AMENDMENT'S COMPULSORY PROCESS CLAUSE WERE VIOLATED

Even if, *arguendo*, Smith was a juvenile, in *Davis v. Alaska*, 415 U.S. 308, 320 (1973) this Court was clear that a state's policy interest in protecting the confidentiality of a juvenile offender's record is subservient to a criminal defendant's right to confrontation and cross examination.

Davis was the latest in a line of U.S. Supreme Court cases that hold a criminal defendant's right to confrontation is paramount to state laws and/or policies that protect accusatory witnesses. See *Smith v. Illinois*, 390 U.S. 129 (1968); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Simply stated, when a witness testifies against another in a criminal case, his records as a juvenile are admissible to attack general credibility and to show any bias, self interest,

motive, or apprehension with his testimony. Wigmore, *Evidence* (Rev. Ed.) § 980 (7). Allen had only to secure a certified copy of the criminal conviction and confront Smith with it at trial. This Allen failed to do. This miscue deprived Stich of the opportunity to present evidence that Baskin, Stich's expert, whose testimony was unrefuted, opined is "nothing more devastating to a person's credibility" than being shown "and having them to admit" a felony conviction. Tr., 158, 13-17.

Once Allen had introduced the certified copy of the criminal record, Allen could further impeach Smith by confronting him with his preliminary hearing testimony, showing that Smith had lied under oath. By properly using Smith's criminal conviction and his lying about it, Allen would have planted the seed of reasonable doubt. *Powell v. Commonwealth*, 13 Va. App. 17, 409 S.E.2d 622 (1991) held that a witnesses general credibility can be attacked by showing the number of felony convictions and by showing that the witness "knowingly testified untruthfully about his felony convictions."

Of course, Smith's credibility, or rather his lack of credibility, was open to attack on several fronts. Allen, had he been prepared, had witnesses that could have recited a long list of Smith's fraudulent activities in the Shenandoah Valley. These activities including filing false tax returns, a form of perjury, see Garber testimony, Tr., 82-83, to filing an inconsistent statement in a legal pleading where Smith defended himself in a suit brought by Stich's religious group's former landlord, Marilyn Solomon. Allen had the court pleading which was given to him by the Stichs. Garber could have provided the false tax returns. In *Lambert v. Commonwealth*, 9 Va. App. 67 383 S.E.2d 782 (1989) decided long before Stich's trial in 1994, the Virginia Court of Appeals recognized a "narrowly limited exception" permitting a witness's credibility to be attacked by inquiring into specific instances of prior "unadjudicated acts of perjury." Again, Allen did nothing. Allen could have used as

a prior inconsistent statement, Smith's glowing appraisal of Stich' book in Smith's "Foreword" to the book. See, Rogers testimony, Tr., 235; J. Stich's testimony, Tr., 260-261. In the "Foreword," Smith "swore before God" to the truthfulness of the book and to "the integrity" of Joseph. See J. Stich, *Covenants, Commandments and Conversations of the Lord God of Hosts as Given To Joseph Stich*, "Foreword" (no page numbers). Stich directed Allen to confront Smith with the book and Smith's "Foreword." Allen did nothing.

This matter also raises the constitutional issues of the supremacy of a criminal defendant's rights to cross examination vis-à-vis a state's rules of evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) is the critical case for Stich on this issue. In *Ritchie*, this Court mandated that a defendant charged with sex abuse is entitled to have the DSS file reviewed *in camera* by the trial judge. Allen's failure to do even elementary research which would have turned up *Ritchie* vitiated this important right for Stich.[2] *Ritchie* also reiterated the Court's holding in *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1975) (per curiam) that the right to cross-examination is a constitutional right protected by the Sixth Amendment. 480 U.S. at 51. In *Fensterer*, the Court also noted that it has scrupulously guarded against "restrictions imposed by law or by the trial court on the scope of cross-examination." See *Fensterer*, 474 U.S. at 18. The right to cross-examine "includes the opportunity to show that a witness is biased, or that the testimony is exaggerated,

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[2] When Stich's current counsel took over the case long after Stich's conviction, the request was made under *Ritchie*, and granted that the DSS file be turned over to Judge Sarver, the trial judge. At that time, counsel was looking for *Brady* material that had not been provided to the defense. Judge Sarver by letter informed counsel that he found no *Brady* material. Counsel questions this decision. For example, there should have been in the DSS file a report of Dr. Leroy who had physically examined the children at the request of DSS. Dr. Leroy found no physical evidence of abuse, certainly a piece of exculpatory evidence. The Stich's had Dr. Leroy's report. Judge Sarver did not know that they had it.

or *unbelievable* [emphasis added]." Id. "This type of evidence," that testimony is unbelievable, "can make the difference between conviction and acquittal. *Napue v. Illinois*, 360 U.S. 264 (1973)." 480 U.S. at 82. Stich's case is certainly a vivid illustration of that last statement.

Ritchie went on to reiterate that *Davis v. Alaska*, above, upheld the supremacy of the confrontation clause over the privacy interests of juvenile offenders. Id. Lastly, *Ritchie* spoke to the little litigated compulsory process clause of the Sixth Amendment. "Our cases [compulsory process clause cases] establish at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. See *Chambers*, above, *Cool v. United States*, 409 U.S. 100 (1972 (per curiam); *Washington v. Texas*, 388 U.S. 14 (1967). Accord. Va. Const., article 1, § 8 (. . . defendant can "call for evidence in his favor. . . ."); *Wood v Commonwealth*, 214 Va. 296, 199 S.E.2d 529 (1973) (defendant entitled to pursue matter of other crimes committed by prosecution witness).

Stich, of course, could have attacked Smith's credibility by showing bias, motivation to fabricate, self-interest, etc. *Banks v. Commonwealth*, 16 Va. App. 959, 434 S.E.2d 681 (1993); *Barker v. Commonwealth*, 230 Va. 370, 376, 337 S.E.2d 729, 733-34 (1985). The factual predicate for Smith's bias, etc. should have been laid by Allen in the testimony of Nancy Stich, Jenny Rogers, and Stich. Distilled to its essence, Smith was jealous of Stich, upset because Stich's book financed by Smith had not sold well, and there were theological differences between Stich and Smith. See, i.e., Tr., 54 (Nancy Stich, jealously, Smith wanted to be "leader" of religious group); Tr., 230 (Rogers, 19-24, Smith tries to get her "riled up" against Stich, change her religious views); Tr., 266 (J. Stich, Smith angry, upset that book not selling).

Lastly, Stich had a right to put on as many witnesses that he could find to testify about the reputation for untruth-

fulness and dishonesty of Smith despite any effort of the trial judge to limit the amount of this testimony as cumulative. See *Proctor v. Town of Colonial Beach*, 18 Va. App. 28, 441 S.E.2d 233 (1994) (Article 1 § 8, Va. Const. abridged when trial court limited evidence because it was cumulative); *Massey v. Commonwealth*, 230 Va. 436, 337 S.E.2d 754 (1985) (although cumulative evidence may be limited by trial court, relevant evidence even though cumulative should be admitted). Given Smith's peculations and untruthfulness, Allen would had had a surfeit of people ready and willing to testify about Smith's reputation.

The bottom line is that Virginia's evidentiary rules about attacking a Commonwealth's witness's credibility are subservient to Stich's right to confrontation and compulsory process under the Sixth Amendment.

III. STICH'S COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND v. WASHINGTON* AND COUNSEL'S MULTIPLE FAILINGS SHOULD HAVE BEEN CONSIDERED CUMULATIVELY

Under *Strickland v. Washington,* 466 U.S. 668, (1984), a petitioner claiming ineffectiveness must show that: (1) "in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent performance"; and (2) there is "a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 690-94; *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991).

The District Court judge found that Allen was ineffective because he failed to subpoena witnesses and he failed to read Stich's book. App. 13-14. That only these two failings would be considered is myopic. Allen's other failings also violated the standard for competent defense counsel in Virginia, as Mr. Baskin testified. Stich will discuss each failing. The failure to do legal research because of its

pervasive effect on all of the legal issues raised at Stich's state court criminal trial will be incorporated into the discussion of the other errors.

FAILURE TO SUBPOENA WITNESSES

It is beyond caveat that Allen did not subpoena critical witnesses, particularly Dr. Frank Gearing. Allen admitted that he "blew it," "made some bad mistakes," Tr., 100, 16-22, including not subpoenaing Gearing, Tr., 120, 25, 121, 1. Allen also admitted that Gearing was critical. Tr., 139, 5-7, Allen, "would like to think" that Gearing would have made a difference. Allen's excuse that Dr. Karmy, the prosecution's expert was unqualified and, therefore, by implication, that Gearing was unnecessary, is impoverished. It is axiomatic that you do not rely on the prosecution to prove your case. Assuming, *arguendo*, that Karmy was ruled unqualified, which he should have been by his own admission, then having Gearing testify gives Stich a big plus.

Gearing was critical because he would have countered the testimony of Dr. Karmy, the prosecution's expert. Dr. Gearing also corroborated the testimony of Dr. Leroy that there was no physical evidence of abuse. Dr. Gearing was the pediatric gynecologist that Karmy testified was the proper expert to evaluate the Stich children. Gearing had extensive experience in child sexual abuse cases, experience that Karmy admitted that he lacked. Tr., 17, 3-8.

Gearing specifically would have countered Karmy by testifying that in Gearing's experience and in the medical literature that in young children oral manipulation or digital manipulation [what Stich allegedly did] results in trauma. Gearing would have explained in detail and while doing so contradicted the testimony by Dr. Karmy the Commonwealth's expert that Katina Stich's irregular vagina meant that she was sexually abused. Gearing would mention that the medical literature specifically warns about drawing such an inference from an irregular vagina. See Gearing's

Affidavit and Tr., 11-18. See, i.e., J. McCann, et al., "Genital Findings in Prepubertal Girls Selected for Nonabuse: A Comparative Study," *Pediatrics*, Vol. 86, No 3, September, 1990 at 428. Dr. McCann is probably the leading expert in the world on the physical manifestations of abuse in the genitals of prepubertal females. Gearing would have included in his testimony his finding that there were no signs of scarring or healing from scarring. Tr., 22, 12-25. Such scarring, according to Gearing lasts for "several years." Id., 23, 7-11. It must be emphasized that Allen had available two medical experts, Gearing and Leroy whose findings were consistent that no abuse occurred. Neither expert testified. Gearing would have been the only medical child sexual abuse expert to testify, a plus for Stich. When Gearing's testimony is viewed cumulatively with the rest of Allen's errors, see below, there is little question of a reasonable probability that the outcome would have been different.

Gearing saw the children on April 20, 1993, about five months after the alleged abuse, well within the time when any scarring or healing would have been detectable. He sent a letter of his finding to Allen. Allen waited until the day before trial to contact Gearing, which, of course, was too late. Tr., 18; 19, 9-15.

Dr. Pasternack was a key witness, not as critical as Gearing. Pasternack had conducted psychological examinations of the two girls who denied being inappropriately touched by Stich . Dr. Pasternack believed that the young children had been coached by DSS to say that they were abused. He also could have been questioned about the results of his examination and clinical observations without violating any of the rules of evidence. Pasternack's testimony was admissible. In *Jenkins v. Commonwealth*, 22 Va. App. 508, 471 S.E.2d 785 (1996) (*en banc*), the Virginia Court of Appeals was clear that a mental health professional can repeat in court the statements made to the professional by a child/patient in the therapeutic setting. The Court

explained that the statements are not hearsay because not offered for their truth. *Jenkins*, at 519-520. The statements are admissible to show the basis for the mental health professional's opinion. *Jenkins* was decided long after Stich went to trial. Yet the precedents relied on by the Court of Appeals include *Donahue v. Commonwealth*, 225 Va. 145, 300 S.E.2d 786 (1993) and *Hanson v. Commonwealth*, 14 Va. App. 173, 416 S.E.2d 14 (1992), both decided before Stich went to trial.

Jenkins has just been overturned by the Virginia Supreme Court, *Jenkins v. Commonwealth*, 255 Va. 333 (1997); 1997 Va. Lexis 1995. However, neither *Donahue* nor *Hanson* has ever been overturned. These are the cases that Allen should have relied on to make a persuasive legal argument that Pasternack's testimony about what he was told by his clients was admissible. The proof of the persuasiveness of the argument is that several years after Stich's trial, the Virginia Court of Appeals sitting *en banc* decided *Jenkins*. Moreover, *Cartera v. Commmwealth*, 219 Va. 516, 519, 248 S.E.2d 784 (1978) held that a physician could state in court that his patient told him that she had been raped. The physician could not opine that the patient was raped.

Under the ancestors of *Jenkins*, Pasternack could have repeated the children's assertions that they were coerced into saying they were abused in offering an opinion about their mental and emotional state at the time. Effective defense counsel, of course, would have done the legal research to be prepared to argue the admissibility of Gearing's and Pasternack's testimony and to build a record for appeal. Again, Mr. Allen failed. Expert testimony was so vital to this case that the Commonwealth Attorney relied on Karmy's testimony in closing argument. Trial Tr., 406, 20-23. Baskin testified that Gearing was critical, Tr., 167, 12-25, because juries accept scientific evidence, Tr., 176, 11-21.

There was numerous other witness that were not subpoenaed. Dr. Leroy the emergency room physician who

examined the children and found no physical evidence of abuse The reputation witnesses, for another example. There is no need to belabor what is obvious. The failure to subpoena witness has two prongs. Having a witness present is of little value if the witness has not been prepared for direct and cross-examination.

FAILURE TO PREPARE WITNESS

Not one witness, *not one*, who testified at Stich's trial for the defense was prepared for direct or cross-examination, including amazingly, the defendant. See Tr., 45, 15-21 Nancy Stich; 77-78, Garber, never talked to Allen who called him out of blue to testify, testimony not prepared; Tr., 229, 13-25, Jenny Rogers; Tr., 268, 18-25, 269, 1-12, J. Stich. The one witness who did not testify at the trial, Houston Miller, Allen did briefly talk to Allen. Lawrence Stich, Stich's father and a former supervising corporate counsel for IBM, was present on the morning of the second day of the trial with Joseph and Allen, when Allen was supposed to prepare Joseph to testify. Lawrence Stich was so upset with Allen's lack of organization and that Allen was not preparing Joseph to testify that Lawrence had to leave Allen's office for fear that he would explode in rage at Allen. See Tr., 204. It is the height of professional irresponsibility to put a criminal defendant on the witness stand without preparing the witness for direct and cross-examination. Needless to say, a well-prepared defendant who is as articulate as Joseph Stich is can be the critical difference in a criminal trial. Mr. Baskin testified to the obvious—that criminal defense counsel must prepare witnesses to testify. Not to do so is below the standard. See Tr., 169, 15-25, 170, 1-22.

FAILURE TO INVESTIGATE

Allen did no independent investigation of the facts including not reading Stich's book or visiting the crime scene or talking to witnesses. The failure to visit the crime

scene was a major blunder by Allen for the physical layout of the crime scene made what Smith claimed that he saw impossible. See Jenny Roger's testimony, Tr., 226-227; Baskin's testimony, Tr., 171 (failure to visit crime scene below standard). Stich had prepared a computer generated drawing of the crime scene that was ruled inadmissible because not to scale. An erroneous ruling by the trial judge that again highlighted Allen's failure to do even the elementary research required of criminal defense attorneys in Virginia. See, Baskin's testimony. Tr., 184-185 (no evidentiary requirement that a sketch be to scale).

Allen simply did not know or understand the basic facts of the case and did nothing to find out what the basic facts were. For example, Allen did not understand that Smith's testimony was never corroborated by his wife, Dana Straw Smith. She allegedly saw another incident of abuse different from her husband, a fact mentioned by Judge Turk. Neither incident was corroborated. Dana's testimony is parasitic to Tim Smith's testimony. Destroy his credibility and you destroy her. There was also a bias issue with her. Jenny Rogers could have testified that Dana freely helped Tim spend the "proceeds" of the bank robberies. Jenny Rogers, Tr., 222, 20-25. Jenny had also given Allen information that Dana let Joseph care for her child after her husband allegedly saw Joseph abuse his children. Would a parent who has witnessed child sexual abuse repeatedly leave her own child with the abuser? Here is another instance where the symbiotic relationship between pieces of evidence and Allen's failures come to the forefront. Allen was unaware that Dana Straw had left her children in Stich's care after witnessing the abuse. Why? Allen never interviewed his own witnesses prior to putting them on the witness stand. Dana Straw's and Carrigan's testimonies were parasitic to Tim Smith's testimony. Without Tim Smith, the prosecution did not have a case. Again, Allen's lack of knowledge of basic facts rendered him impotent to attack prosecution witnesses.

The facts were victimized like everything else Allen did—they were unorganized, key facts were either not known, forgotten, or never presented to the trier of fact who were left ignorant of essential information. See discussion above.

Stich's book presented a marvelous opportunity for defense counsel to attack the prosecution's critical witness. Counsel had a witness that testified incorrectly about the book and who had previously profusely praised the book and its theology. Smith testified that Stich taught that child sexual abuse was okay as part of his religious theology. In fact, just the opposite is true. In his book, Stich unequivocally in harsh language condemned pedophilia. It does not take much imagination to visualize Allen handing the book to Smith with a "show me" question—show me where Stich advocates pedophilia as a religious dogma. Minutes drag by as Smith fumbles with the book trying to find the non-existent passages. Then Allen reads from the passages where, for example, Stich condemns all pedophiles to eternal damnation. The jury quickly perceives that Smith does not know what he is talking about. Then, Allen hits Smith with Smith's "Foreword." Instead, the jury was given the impression that Stich, like David Koresch in Waco, Texas, who was in the headlines in the summer of 1994, was a religious nut who, like Koresh, advocated child sexual abuse. This is why Baskin was clear that Allen did not effectively use Stich's book. Tr., 179.

Baskin was clear that a factual investigation by Virginia defense counsel is "indispensable" and is "a matter of minimal competence." Tr., 167, 1-11.

THE LEGAL RESEARCH ISSUE

Counsel has woven Allen's failure to do basic legal research into the warp and woof of the discussion above. To repeat the discussion would be redundant. Allen's derelictions in this area are not only the failure to do

research, but Allen let a Jenny Rogers, a person untrained in even the rudiments of legal research do his. research. Tr., 217. Lawrence Stich tried to help Allen by providing some research but this assistance was ignored. Tr., 202-203.

Allen's failure to do research, interview witnesses is evident from a perusal of his file. Thomas Vail, a law school graduate paralegal working for Stich's current counsel thoroughly examined the file and found nothing to indicate that Allen had effectively represented Stich. See Tr., 64-66; Vail looked for preparation materials—found none; looked for research materials—found none; looked for witness interview material—found none.; Tr., 91, Allen testified that file that Vail examined was the complete file.

THE PREJUDICE ISSUE

The Sixth Amendment guarantees the "effective assistance of counsel." *United States v. Cronic*, 466 U. S. 648, 654 (1984). The latest pronouncement of the this Court on the prejudice habeas petitioners have to show is *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). In *Kyles*, this Court stressed and affirmed the "reasonable probability" standard. The Court emphasized that the definition of "reasonable probability" as stated in *Nix v. Whiteside*, 475 U. S. 157, 176 (1986) means that "a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland.*" Reasonable probability is not tied to outcome, but to confidence in the fairness of the trial. *Kyles*. at 1566.

In this matter, then, the particularized issue is: Did Stich receive a fair trial when his defense counsel did not subpoena witnesses, did not call expert witnesses that minimally would have refuted the testimony of the Commonwealth's expert; did not do the required legal research; did not interview witnesses prior to their testimony; and did not investigate the facts of the case. In a

word, Mr. Allen did not do any of the basic things that criminal defense attorneys in Virginia are required to do.

The federal courts that have considered just one of the failures identical to Allen's have found ineffective assistance of counsel. See, e.g., *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994) (failure to interview and subpoena witnesses); *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (failure to investigate); *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993) (failure to obtain exculpatory expert testimony not excused as a strategic decision); *Workman v. Tate*, 957 F.2d 1339 (6th Cir. 1992) (failure to contact or call witnesses not excused as strategic decision); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991) (failure to investigate, not excused as a strategic decision); *United States v. Hill*, 827 F. Supp. 738 (S.D. Fla. 1992) (failure to subpoena witnesses); *Halton v. Hesson*, 803 F. Supp. 1272 (M. D. Tenn. 1992) (cumulative effect of counsel's many errors); *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355 (4th Cir. 1992) (failure to present important witness could not be excused as tactical decision); *Walker v. Mitchell*, 587 F.Supp. 1432 (E.D. Va. 1984) (failure to do factual and legal investigation); *Taylor v. Starns*, 650 F.2d 38 (4th Cir. 1981) (failure to know substantive law); *Baty v. Balkcom*, 661 F.2d 391, 392 (5th Cir. 1981) (no investigation, no legal research).

In its evaluation of ineffective assistance claims, the key factor for a habeas court to consider is the cumulative impact of the error or errors attributed to defense counsel. *Kyles* at 1569; *Strickland*, above, 466 U. S. 668, 690 (1984). In *Kyles*, the Court commented that the Third Circuit did not consider the cumulative effect by its ". . . repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." *Kyles*, 1569.

Similarly, Stich's ineffective assistance claim cannot be analyzed compartmentally by dissecting Allen's conduct into unrelated segments. The analysis must focus on the

cumulative effect of the unprofessional conduct. The failure of Allen to do the elementary things that criminal defense attorneys do, i.e., interview witnesses, legal research, etc., had a cumulative adverse effect on the presentation of Stich's defense, an effect that cast a pall on the proceedings and deprived Stich of a fair trial. In this case, Allen's miscues were so many and involved omissions of the basics of criminal defense that the question should be: Would Stich have been any worse off if he had defended himself? With Lawrence Stich as a guide and with Jenny Rogers and Nancy Stich's help it is reasonable that Stich could have done better without Allen. At least witnesses would have been interviewed, some research done, expert witnesses would have been subpoenaed. Baskin, of course, found that Stich's case had been prejudiced by Allen's incompetence. Tr., 171, 18-22.

Magistrate Judge Conrad declined to assess the impact of the cumulative effect of defense counsel's errors in determining whether Stich had met the prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984). Report at 19. Judge Conrad indicated that the cumulative assessment would have led to a different recommendation. Id at 33, n.3. Judge Conrad's interpretation is too narrow and inconsistent with the consensus of the federal appeals courts that have decided the issue. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits agree that multiple errors must be assessed cumulatively. See cases cited, Report at 21-23. Only the Eighth Circuit and with this case the Fourth Circuit have adopted the individual prejudice standard.

Judge Conrad was imprecise when he stated that ". . . . neither the Supreme Court or the Fourth Circuit has ever expressly supported one interpretation of *Strickland* over the other." Report at 23, App. 40. *Strickland* constantly refers to "errors" of defense counsel. *Strickland* stressed that "in any case considering an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S.

at 688. *Strickland* rejected fixed rules for evaluating an ineffective assistance claim because of the "variety of circumstances faced by defense counsel or the range of legitimate decisions" that defense counsel must make. Id at 689. *Strickland* continued at 466 U.S. 695-96 that:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Earlier this Court had emphasized that when a defendant "challenges a conviction, the question is whether there is a reasonable probability that, absent the *errors* [emphasis added], the factfinder would have had a reasonable doubt respecting guilt." Id.

In *Kyles v. Whitley*, above, this Court reiterated that errors must be assessed cumulatively. *Kyles*, a habeas case, was not grounded on ineffective assistance, but on violations

of *Brady v. Maryland*, 373 U.S. 83 (1963). The linchpin of a *Brady* violation is materiality. Materiality in the *Brady* sense was defined in *United States v. Agurs*, 427 U.S. 97 (1976). *Agurs* "formulation of materiality" was "later adopted as the test for prejudice in *Strickland*. *Kyles*, 514 U.S. at 436.

In evaluating Kyles's *Brady* claim in a habeas context this Court emphasized that the key factor was the cumulative impact of the constitutional violations. *Kyles* at 1569; see *Strickland*, above, 466 U. S. 668, 690 (1984). In *Kyles,* the Court commented that the Third Circuit did not consider the cumulative effect by its ". . . repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone." *Kyles*, 1569. Since *Brady* materiality and *Stickland* prejudice are identical, the identical standard applies to both–the cumulative effect on the fairness of the trial.

Judge Conrad pointed out that the Fourth Circuit in the past, "over vigorous dissent," has rejected the cumulative impact. See Report at 22 for citations. However, in *Huffington v. Nuth*, 1998 WL 142317 (4th Cir. 1998), the Fourth Circuit did evaluate multiple errors cumulatively. Report at 19. It is noteworthy that the Fourth Circuit in *Huffington* relied on *Williams v. Armontrout*, 912 F.2d 924, 934 (8th Cir. 1990). Yet, the Eighth Circuit has retreated in later cases from *Williams*. There apparently is a spilt within the Eighth Circuit and the Fourth Circuit over the cumulative-separate issue as well as a spilt between the Circuits with the Eighth and the Fourth aligned against those circuits noted above whom have definitively adopted the cumulative standard.

The cumulative analysis of multiple errors is the more realistic approach. This individual analysis ignores a fundamental principal of evidence. A piece of evidence is a brick not a wall. Individual analysis examines the wall by assuming that only one brick was missing at a time. It presumes that all the other missing bricks are in place while the missing brick is examined in isolation. In fact, the bricks

support each other. If many bricks are missing, the wall becomes unstable and collapses.

Cumulative analysis takes into consideration the symbiotic relationship between the bricks. In a search for truth, the more realistic analysis comes closer to finding truth. Moreover, legally cumulative analysis is the better reasoned, most consistent approach to multiple errors as stated in *Strickland* and *Kyles*. This Court has an opportunity in this matter to put an end to this controversy.

Lockhart v. Fretwell, 504 U.S. 364, 113 S. Ct. 838 (1993), reiterated *Strickland's* holding that the right to counsel exists to guarantee a fair trial. 113 S.Ct. at 842 citing *Strickland*, above at 684. The Court also seemingly said that ineffective assistance is tied to the abridgment of an accused's procedural and/or substantive right. Stich meets this test. Allen's failures denied Stich his right to call for favorable evidence under Article 1, § 8 of the Constitution of Virginia, the Compulsory Process clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment and his right to effective cross examination under the confrontation clause of the Sixth Amendment. The denial of the right to effective cross-examination is Constitutional error of the "first magnitude and no amount of showing of want of prejudice would cure it." *Smith*, above, 390 U.S at 131. Stich has met the standard for collateral review of constitutional error, that is, "whether the error had 'substantial and injurious effect in determining the jury's verdict'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

Another view of ineffective assistance emphasizes defense counsel's role as a protector of constitutional and statutory rights of an accused. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Allen

failed this test also. He did nothing to ensure that Stich's procedural and substantive safeguards were protected.

IV. COUNSEL'S MULTIPLE ERRORS WERE SO EGREGIOUS THAT THE COMMONWEALTH'S CASE WAS NOT SUBJECTED TO MEANINGFUL ADVERSARY TESTING

This case presents the unusual situation where defense counsel essentially did nothing to represent his client. As sketched above, counsel did not subpoena witnesses, did not prepare witnesses to testify, including the defendant, did no legal research, did no investigation. Stich's case was in fact tried without the assistance of counsel. Given the unusual circumstances, prejudice, therefore, should be inferred under *United States v. Cronic*, 466 U.S. 648 (1984) and its progeny.

Parsed to its essence *Cronic* says that if defense counsel is prohibited from rendering assistance to his client by outside sources or counsel's performance is so deficient that in fact no assistance was rendered, a constitutional violation has occurred. The "core purpose" of the Sixth Amendment was to assure "Assistance" at trial. *United States v. Ash*, 413 U.S. 300, 309 (1973). "If no actual assistance is provided, "then the constitutional guarantee has been violated." *Cronic* at 654. See *United States v. Decoster*, 199 U.S. App. D.C. 359, 382, 624 F.2d 196, 219 (MacKinnon, J., concurring), cert. denied, 444 U.S. 944 (1979).

Effective assistance means that defense counsel acts in the role of an advocate. *Anders v. California*, 386 U.S. 738, 743 (1967). The prosecutor's case must be put through the crucible of adversary testing. When a criminal trial loses "its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, above at 657. In the words of Judge Wyzanski in *United Sattes ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), cert. denied *sub nom*, *Sielaff v. Williams*, 423 U.S. 876 (1975),

"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Allen left Stich at the mercy of the Commonwealth. The jury that convicted Stich never heard Stich's side of the story. Stich had a lawyer who simply did nothing. Under these facts, the outcome of Stich's trial should be presumptively unreliable. For example, no specific showing of prejudice was required in *Davis v. Alaska*, above, because the accused had been denied the right of effective cross-examination. Stich also was denied that right. How can defense counsel who does not know essential facts, has not done an independent investigation, not prepared for trial, etc., etc., effectively cross-examine prosecution witnesses or put the prosecution to a meaningful adversarial test? As pointed out above, as a result of his counsel's complete failure to do any of the key tasks that criminal defense attorneys are required to do, Stich was denied basic constitutional rights. When counsel does not do any of the basics the criminal trial is not an adversary contest.

CONCLUSION

Stich has steadfastly maintained his innocence. The multiple failings of his defense counsel coupled with the failure of the prosecutor to fulfill his *Brady* obligations raise the specter that an innocent man has been unjustly convicted. They certainly cast doubt on the fairness of his trial and the reliability of his convictions. This Court should grant certiorari.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-7124

JOSEPH P. STICH,

Petitioner - Appellant,

versus

RON ANGELONE, Director,
Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge. (CA-96-837-R)

Submitted: November 30, 1998
Decided: December 23, 1998
Entered: December 23, 1998

Before MURNAGHAN, WILLIAMS, and MOTZ,
Circuit Judges.

Dismissed by unpublished per curiam opinion.

John M. DiJoseph, KAVRUKOV, MEHROTRA & DIJOSEPH, Arlington, Virginia, for Appellant. Kathleen B. Martin, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998). We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. See Stich v. Angelone, No. CA-96-837-R (W.D. Va., filed June 30, 1998; entered July 1, 1998). See Fed. R. Civ. P. 58, 79(a). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH P. STICH,

Petitioner,

v.

RON ANGELONE,

Respondent.

Civil Action No. 96-0837-R

Entered: June 30, 1998

MEMORANDUM OPINION

By: Hon. James C. Turk
United States District Judge

This matter is before the court upon a Report and Recommendation filed by the U.S. Magistrate Judge on April 3, 1998, pursuant to 28 U.S.C. § 636(b)(1)(B). Both the respondent and petitioner Stich have filed objections to the Report. After de novo review of the portions of the Report and the record pertinent to each objection, the court adopts the Report and Recommendation in substantial part as herein explained and denies Stich's petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254.

In his petition, Stich raised five claims of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) and a sixth claim that the prosecution failed to disclose exculpatory evidence under Brady v. Maryland,

373 U.S. 83 (1963). The respondent filed a motion to dismiss to which the petitioner responded. The court granted the motion to dismiss as to the Brady claim and referred the ineffective assistance claims to the Magistrate Judge for conduct of appropriate proceedings and preparation of the Report and Recommendation, pursuant to 28 U.S.C. § 363(b)(1)(B). The Magistrate Judge conducted an evidentiary hearing on July 24, 1997, and thereafter received additional briefs from both parties.

As set forth by the Magistrate Judge in his Report, to prevail in his ineffective assistance of counsel claims, Stich must satisfy the two prong standard, as set forth in Strickland v. Washington, supra. 466 U.S. at 687. First, he must show that "counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. Id. at 687-88. Second, he must demonstrate "a reasonable probability that but for counsel's unprofessional errors," the result reached by a reasonable and impartial factfinder would have been different. Id. at 694-95. To satisfy this "prejudice" prong of the Strickland standard, the attorney's errors must have been so egregious as "to undermine confidence in the outcome," even given the totality of the evidence before the factfinder. Id. at 694. Finally, because Stich seeks federal habeas relief from a state court judgment, he must demonstrate that the determinations of the state courts, in adjudicating his current claims under Strickland, were unreasonable. See §2254(d) as amended, 1996. The state habeas court found no attorney incompetence or resulting prejudice as defined in Strickland.

Applying these standards to Stich's claims, the Magistrate Judge first addressed Stich's argument that even if no single incompetent act by counsel was egregious enough to satisfy the Strickland standard, the accumulation of attorney deficiencies was. The Magistrate Judge noted that the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have not explicitly addressed whether attorney errors can be accumulated to

meet Strickland requirements. The Magistrate Judge rejected Stich's cumulative error argument and concluded that Strickland requires "petitioner to point to specific deficiencies in his attorney's conduct and to establish prejudice resulting from one or more of these deficiencies standing alone."

Moving to the merits of Stich's individual claims, the Magistrate Judge concluded that Stich's counsel performed incompetently in two respects: he failed to subpoena Dr. Gearing as a medical expert witness and he failed to become more familiar with Stich's religious beliefs by reading Stich's book in preparation for cross examination of the Commonwealth's key witness, Tim Smith. The Magistrate Judge also noted that Stich's attorney may have acted incompetently in two additional respects: he did not prepare Stich and his defense witnesses to testify and he did a poor job researching legal issues likely to arise at trial. However, the Magistrate Judge concluded that counsel did not act incompetently by failing to: investigate Tim Smith's bank robbery conviction; subpoena and call Dr. Pasternack as a defense witness; and call additional witnesses to testify about Smith's bad reputation in the community. Finally, the Magistrate Judge found that no reasonable probability that but for any one of the alleged errors by counsel, the jury's verdict would have been different. The Magistrate Judge did note that "if petitioner's counsel's errors were considered cumulatively, it is possible that the undersigned's recommended disposition would be different."

A. Respondent's Objections

The respondent first objects to the conduct of the evidentiary hearing, arguing that the court failed to give due deference to the findings of the state habeas court and that the court should have dismissed Stich's petition without any hearing. The court overrules this objection. In addressing the motion to dismiss, the court found that the evidence

raised an inference that Stich's counsel performed ineffectively in several respects. Particularly, the nature of Dr. Gearing's testimony and its admissibility was in dispute and material to a claim upon which Stich might have been entitled to relief.[1] See 28 U.S.C. § 2254(e)(2)(B). Thus, the court appropriately conducted an evidentiary hearing to resolve the matter.

Respondent next objects to the conclusion of the Magistrate Judge that counsel was deficient in failing to subpoena Dr. Gearing. Respondent argues that the court must defer to the state court's finding that the doctor's testimony would have been an inadmissible comment on the ultimate issue of whether Katina Stich had been sexually abused. The court overrules this objection. The Magistrate Judge concluded that the state court's inadmissibility ruling was unreasonable and, therefore, not a bar to a contrary finding by the district court. §2254(d)(1). According to his affidavit attached to the state habeas petition and his testimony at the federal habeas hearing, Dr. Gearing would have testified that during his exam of Katina Stich, he found only normal variants in her hymen and no physical evidence of sexual abuse. This testimony, while important to impeach the Commonwealth's medical evidence, does not go to the ultimate issue of whether sexual abuse has actually occurred. The state court found admissible the Commonwealth expert's testimony that abnormalities he found during Katina's exam could have been caused by sexual abuse. By the same token, the court adopts the Magistrate Judge's findings and conclusions that Dr. Gearing's testimony would

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[1] As the Magistrate Judge notes, petitioner's counsel argued "that Dr. Gearing would have testified that, if events had occurred as alleged by Smith, the children would have exhibited physical symptoms of the abuse." If Dr. Gearing had so testified at the habeas hearing, his testimony would have contradicted not only the Commonwealth's medical evidence, but also the eye witness testimony, severely damaging the Commonwealth's case and likely creating a reasonable probability that his testimony at trial would have affected the outcome in Stich's favor.

have been admissible and that counsel's failure to call Dr. Gearing was incompetent. Id.

Respondent objects to the findings that counsel "may have done a poor job" preparing witnesses for trial and researching pertinent legal issues." The court dismisses this objection. As to these claims, the Magistrate Judge did not find either element of ineffectiveness under Strickland and did not grant habeas relief. Section §2254 does not forbid the federal reviewing court from expressing its honest opinions in disagreement with the state court about the facts of the case. See Green v. French, ___F.3d___, 98 WL 237506, * 4 (4th Cir. 1998)(if incorrectness of state court's decision is "debatable among reasonable jurists," federal habeas court may not grant relief)(emphasis added). The court adopts the conclusions of the Magistrate Judge that counsel may have been ineffective in preparation of witnesses and legal research for trial.

Finally, respondent objects to the Magistrate Judge's conclusion that counsel should have more thoroughly familiarized himself with the religious book Stich had written. Respondent argues that counsel's decision to omit reference to the book or Stich's religious beliefs and teachings was a reasonable trial strategy. The court does not find this assertion to be borne out by the record and overrules this objection. The court agrees that counsel followed a legitimate trial strategy not to emphasize the book or Stich's religious teachings on direct examination of defense witnesses. However, counsel has offered no strategic reason for failing to "investigate" the contents of Stich's books as a means by which to impeach the credibility of Tim Smith, the prosecution's key witness. Strickland, 466 U.S. at 691 (counsel has duty to make reasonable investigation or to make a reasonable decision not to investigate). Smith wrote a glowing forward to the book and funded publishing and distribution of the book; thus, the book was clearly an important topic on which to cross-examine Smith about his abandonment of Stich's teachings. The court finds it

undebatable that counsel acted incompetently by failing to make himself more familiar with Stich's book and beliefs in preparation for cross-examination and that the state court's conclusion to the contrary represents a misapplication of Strickland's incompetence prong to the facts of Stich's case. §2254(d). The court adopts the conclusion of the Magistrate Judge that counsel's failure to read the book was constitutionally incompetent. The respondent does not object to the Report's conclusion that Stich failed to show prejudice as to any of his ineffective assistance claims.

B. Petitioner's Objections

In a pleading styled "Petitioner's Exceptions to Magistrate Judge's Report," Stich objects to the Magistrate Judge's Report in general, asking the court to read and rely on petitioner's trial memoranda, in addition to the "Exceptions," as grounds to reject the Report. This request ignores the clear requirements of §636(b)(1)(C) that the court will "make a de novo determination" only of those portions of the Report "to which objection is made." The court will address de novo Stich's "Exceptions" and carefully consider all of the Report's remaining findings and conclusions in light of the totality of circumstances as required under Strickland.

The court first addresses the Report's remaining findings of fact and conclusions of law as to Stich's individual claims of ineffective assistance. Stich objects to the Magistrate Judge's conclusions that counsel's failure to investigate Tim Smith's juvenile record was neither incompetent nor prejudicial. This conclusion is based on a finding that a juvenile conviction would not have been admissible at trial under Virginia law as set forth in Scott v. Commonwealth, 372 S.E.2d 771 (Va. App. 1988). Stich argues that Smith was tried as an adult, that even convictions over fifteen years old are admissible for impeachment purposes under Virginia law, and that the Constitution

requires admission of juvenile convictions for impeachment purposes regardless of state laws protecting juvenile confidentiality.

The court overrules these objections. Scott supports the reasonableness of counsel's decision to forego investigation of Smith's juvenile court records, the only place he could have found Smith's conviction. Furthermore, the state habeas court carefully considered the Constitution's impact on admissibility of a juvenile conviction, as evidenced by discussions during port-trial hearings and the citation of Davis v. Alaska, 415 U.S. 308 (1974) in the opinion letter denying habeas relief. The court cannot find that the state habeas court acted unreasonably in reconciling Scott and Davis to allow state juvenile protection laws to take precedence over a defendant's desire to introduce a witness's juvenile conviction as a general attack on credibility. See Davis, 415 U.S. at 320 (J. Stewart, concurring)("the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudication's."). The court also finds no merit in petitioner's argument that his use of Smith's conviction is anything but a general attack on Smith's credibility simply because of Smith's inconsistent statement during the preliminary hearing. Because the state court's action is reasonable, the court must defer to it. §2254(d). Based on this conclusion that the conviction would not have been admissible, the court also finds that Stich was not prejudiced by counsel's failure to attempt to introduce it. In short, the court adopts the Magistrate Judge's conclusions of law that counsel's failure to investigate Smith's conviction was not incompetent or prejudicial.

Stich objects to the Magistrate Judge's conclusion that Stich failed to establish prejudice resulting from counsel's incompetent failure to subpoena and call Dr. Gearing. Stich argues that Dr. Gearing's testimony would

not only have neutralized the testimony of the Commonwealth's expert witness, Dr. Karmy, as the Magistrate Judge found, but also would have thereby eliminated medical support for the credibility of Smith's testimony and bolstered Stich's version of events. The court concludes that the potential impact of Dr. Gearing's testimony on the credibility contest between Smith and Stich is not sufficient to undermine confidence in the trial result. First, the medical evidence, at most, offered only weak support for the eye witness testimony about Stich's molestation of Katina, as the medical evidenced about Rachel showed normal genitalia. Second, counsel did succeed in weakening the Commonwealth's medical evidence by forcing Dr. Karmy to admit that he had no expertise in identifying evidence of child sexual abuse evidence. Finally, common sense strongly suggests that the abuse the Smiths described would be unlikely to leave physical evidence. Given these existing weaknesses in the Commonwealth's medical evidence, jurors could only have convicted Stich if they believed the eyewitness. Dr. Gearing's testimony simply would not have offered the jury any additional reason to disbelieve the eyewitness or to believe Stich. Thus, the court finds no reasonable probability that presentation of the testimony would have changed the outcome. Strickland, 466 U.S. at 694. Accordingly, the court overrules the objection and adopts the Magistrate Judge's conclusion that Stich was not prejudiced by this error.

Stich makes no specific objection to the Magistrate Judge's conclusions that counsel was not incompetent for failing to question witness William Garber about specific business and personal experiences Garber had had with Smith; for failing to subpoena or call other witnesses, in addition to Garber, to testify about Smith's poor reputation in the community for untruthfulness; and for failing to call Dr. Pasternack. Stich also raises no specific objection to the Report's findings that no prejudice resulted from these

alleged errors. The court agrees with the Report's analysis on these claims and adopts the findings of fact and conclusions of law that counsel's actions regarding these witnesses were neither incompetent nor prejudicial. Id.

Petitioner objects that the Magistrate Judge should have accepted the unrefuted and uncontradicted testimony of Stich's expert witness on attorney competency, Peter Baskin, who testified at the habeas hearing. Mr. Baskin testified that specific aspects of Stich's counsel's performance fell below the norm for criminal defense attorneys. However, the Court in Strickland expressly requires the reviewing court to consider "all the circumstances" of the particular case in determining the competency of counsel's performance and to look to norms of practice only as guides. 466 U.S. at 688-90. The Magistrate Judge grounded his conclusions on competency firmly in the facts of Stich's case as known to counsel at trial. The court finds no support for petitioner's apparent argument that the performance inquiry should rest instead on a battle of experts on criminal defense representation and overrules the objection.[2]

Stich objects to the statement in the Report that Smith's eye witness testimony about child abuse was "corroborated" by the testimony of Dana Smith. Based in part on this finding, the Magistrate Judge concluded that Stich failed to establish prejudice stemming from counsel's failure to cross-examine Smith using specific passages from Stich's book.. Stich asserts that Dana Smith's testimony did not corroborate Smith's testimony, as she testified about a separate incidence of abuse. The court finds this objection to be merely a word choice disagreement. Dana Smith's testimony about a separate abuse incident clearly gave credence to Smith's testimony of abuse, even if her testimony did not directly confirm the specific events to which he testified. Moreover, Dana Smith did directly corroborate Smith's testimony that Stich's general teachings

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[2] For the same reasons, the admission by Stich's trial counsel that he performed badly is not dispositive of the issue of incompetence.

condoned Stich's sexual activities with the little girls. Even if counsel had pointed to direct passages in the book condemning such activity, a jury could easily have accepted the testimony about Stich's other teachings as the fuller expression of his beliefs. Furthermore, the Magistrate based his conclusion of no prejudice on the finding that Smith's testimony about Stich's book was a small portion of his testimony that was not "so independently inculpatory as to have altered the outcome" of the trial. Use of Stich's book to cross-examine Smith would have implicated, at best, Smith's memory of Stich's teachings, but could not have significantly affected the credibility of Smith's eye witness testimony or the supporting testimony from Dana Smith and James Kerrigan. Therefore, the court overrules Stich's objection and adopts the conclusion of the Magistrate Judge that Stich was not prejudiced by counsel's failure to read and use the book.

Stich also objects to the Report's occasional statement of the Strickland prejudice inquiry as a determination of whether "the outcome of the trial would have been different." Report, p. 31. The court concludes that, regardless of these challenged statements, the Magistrate Judge consistently applied the reasonable probability test in reaching his conclusions about the lack of prejudice under Strickland.

C. Cumulative Errors as Prejudice

Finally, Stich objects to the Magistrate's conclusion that each attorney error must stand on its own for habeas purposes. Stich argues that even if no single error by counsel undermined confidence in the verdict, the court must also assess the accumulated effect of those errors to find prejudice sufficient to satisfy Strickland.[3] The wording of the

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[3] Stich stops just short of arguing that trial counsel performed so poorly as to deny Stich the benefit of counsel's role in the adversarial process. United State v. Cronic, 466 U.S. 648 (1984). Where petitioner

Strickland opinion itself offers support for such a conclusion.[4] See 466 U.S. at 694 ("[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different")(emphasis added). At least two United States Circuit Courts of Appeals have specifically found prejudice in Strickland cases by accumulating the effects of multiple incompetent acts of counsel. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir.1995)(counsel's multiple errors separately deemed incompetent cumulatively rendered trial fundamentally unfair); Williams v. Washington, 59 F.3d 673, 684 (7th Cir. 1995)(two counsel errors separately deemed incompetent cumulatively created reasonable probability of different outcome against two-pronged prosecution case). But cf. Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996)("Each habeas claim must stand or fall on it's own."); Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991)(federal habeas court cannot accumulate attorney errors to satisfy Strickland).

After careful review of the record, the court respectfully declines to adopt the Magistrate Judge's finding that Strickland requires the court to analyze prejudice of individual rather than accumulated attorney errors. The court concludes that because even the accumulated incompetencies of Stich's counsel fail to satisfy the Strickland prejudice prong, the court need not reach a finding as to whether or not Strickland allows cumulative error review. The Magistrate Judge and the court find only two of counsel's challenged actions to be constitutionally

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was denied counsel or had counsel who abandoned his role in the adversarial process, petitioner need not demonstrate prejudice. Id. The court finds that Stich's counsel did perform his advocacy function in the process, albeit haphazardly and even incompetently at times. Thus, the court would also deny relief under Cronic.

[4] The state habeas court carefully tracked the language of Strickland in the opinion letter, suggesting that that court may have well reviewed counsel's errors cumulatively in reaching its conclusions.

deficient performance: failure to subpoena Dr. Gearing and failure to read Stich's book for cross-examination purposes. As explained in discussion of these individual claims, neither of these incompetent actions, individually, prejudiced Stich's defense. The court has carefully weighed the evidence omitted by these two actions and the probable effects of that evidence combined against the weight of the government's eyewitness evidence that persuaded the jury to convict Stich. In this balancing test, the court finds no reasonable probability that the accumulated effects of the omitted evidence would have altered the jury's verdict.

As discussed earlier, the omitted evidence leaves open the common sense conclusions that the abuse probably would not leave scars and that an abuser probably would not publish advocacy of abuse. Thus, the court finds no likelihood that either the doctor or the book passages would have strengthened the persuasiveness of Stich's denials of the abuse or other defense witness' denials that Stich taught pedophilia. Nor did counsel's incompetent omissions significantly weaken the credibility of the Smith's eyewitness testimony. Neither Dr. Gearing's testimony nor the book passages supported a finding that the Smiths physically could not have seen the events to which they testified or that they had any motive to lie about the sexual abuse.

Based on the foregoing, the court concludes that Stich has failed to establish any reasonable likelihood that but for counsel's incompetent errors, individual or cumulative, the jury would have acquitted him. Strickland, supra. Accordingly, the court must also conclude that Stich is not entitled to habeas relief and dismiss the petition. An appropriate order shall be entered this day.

The petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such

extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for the respondent.

ENTER: This 30th day of June, 1998.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH P. STICH,

Petitioner,

v.

RON ANGELONE,

Respondent.

Civil Action No. 96-0837-R

Entered: June 30, 1998

ORDER

By: Hon. James C. Turk
United States District Judge

This habeas action is before the court upon the Report and Recommendation of the U.S. Magistrate Judge, prepared pursuant to 28 U.S.C. § 636(b). The Magistrate Judge recommended that the petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, be denied. After de novo review of the Report and portions of the record pertinent to the objections of the parties, it is hereby

ORDERED

that the Report and Recommendation of the Magistrate Judge shall be and hereby is **ADOPTED** in substantial part, in accordance with the accompanying memorandum opinion; that the petition for writ of habeas corpus, pursuant to 28

U.S.C. §2254, shall be and hereby is **DENIED**; and that this action is hereby stricken from the active docket of the court.

The Clerk is directed to send certified copies of this order to petitioner and to counsel of record for the respondent.

ENTER: This 30th day of June, 1998.

/s/ James C. Turk
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH P. STICH,

Petitioner,

v.

RON ANGELONE,

Respondent.

Civil Action No. 96-0837-R

REPORT AND RECOMMENDATION

By: Hon. Glen E. Conrad
United States Magistrate Judge

Entered: April 3, 1998

Joseph P. Stich, a Virginia inmate, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. Stich is presently incarcerated at the Coffeewood Correctional Center ("CCC") pursuant to a judgment issued by the Circuit Court of Shenandoah County on February 10, 1994. He was convicted of two counts of sodomy and two counts of sexual battery. Stich received a sentence of twenty-four (24) years in prison and now challenges the constitutional validity of these criminal convictions.

Stich filed his petition for writ of habeas corpus in this court on September 20, 1996, raising the following constitutional claims:

(1) Trial counsel failed to investigate and discover evidence of Timothy Smith's prior felony conviction, and failed to adequately impeach Smith's testimony;

(2) Trail counsel failed to subpoena critical witnesses;

(3) Trial counsel failed to adequately prepare the petitioner and other defense witnesses prior to testifying at petitioner's criminal trial;

(4) Trial counsel failed to adequately research certain legal issues relevant to the petitioner's defense;

(5) Trial counsel failed to read the petitioner's book prior to trial so that he might be able to refute certain mischaracterizations of the book's content made by witnesses for the prosecution; and

(6) The Commonwealth failed to hand over evidence favorable to the defense in violation of petitioner's Sixth Amendment rights as established in Brady v. Maryland, 373 U.S. 83 (1963).

Respondent filed a motion to dismiss on October 28, 1996. In response, the petitioner filed a motion in opposition on November 12, 1996. On March 4, 1997, United States District Judge James C. Turk issued an order and memorandum opinion granting respondent's motion to dismiss as to petitioner's Brady claim. However, Judge Turk denied respondent's motion as to petitioner's claims of ineffective assistance of counsel and referred those claims to the undersigned United States Magistrate Judge for conduct of an evidentiary hearing. A hearing was held on July 24,

1997. As directed by the court's order, the undersigned submits the following Report and Recommendation.

Statement of Facts

Petitioner and his wife Nancy, formerly a pianist for the national ballet, were married in 1985. At that time, both were members of the Mormon church. Through their involvement in the church, they became friends with Tim Smith and his first wife. Petitioner and Smith had actually been childhood friends and had become reacquainted through their involvement in the Mormon Church. In 1990, the two couples decided to move together to British Columbia, Canada. Petitioner and his wife wanted time to explore their religious beliefs. Smith and his wife wanted to lead a quieter lifestyle with their two sons. The two families lived together in British Columbia for approximately seven months.

After leaving Canada, Smith and his family returned to Northern Virginia where Smith started an antique furniture restoration business that he owned and had run intermittently since he was seventeen. Shortly thereafter, Smith separated from his first wife and moved to Shenandoah County, Virginia, where he continued to run his business. Meanwhile, petitioner and Nancy moved to Nashville, Tennessee where Nancy gave birth to the couple's first child, Katina. In Nashville, the couple met and became friends with a woman named Jenny Rogers, an audio engineer for Polygram Records who had some affiliation with the Mormon Church. At the time, Rogers had one daughter, Rachel Borgenson. In February of 1991, petitioner, his wife Nancy, and Jenny Rogers decided to live together with their children. They also agreed that Rogers would live as a second wife to Joseph.

While in Nashville, petitioner began writing a book about his personal theology that he hoped to have published. In order to facilitate the petitioner's completion of the book, Smith proposed that petitioner, Nancy, Rogers, and their children come to live with him in Virginia. Smith offered to pay for the group's living expenses, so that petitioner could

spend his time completing the book and the women could stay home with their children. In addition, Smith agreed to finance the cost of the book's publication and assist in promoting the book to distributors and stores. In exchange for all this, petitioner agreed to assist Smith with his furniture business and the women agreed to take responsibility for the management of the group's household. Petitioner, Nancy, Rogers, and their children moved to Virginia in November 1991. After the group moved to Virginia, Smith's new girlfriend, Dana Straw, came to live with the group, Nancy gave birth to a second daughter, and Rogers gave birth to a second child, Matthew; Joseph was the father of both children.

Initially, the group lived together without incident. Petitioner finished his book, titled Covenants, Commandments, and Conversations with the Lord God of Hosts, and printed five thousand copies. Smith continued to run his furniture business with the help of James Carrigan and petitioner. Smith also made some efforts to contact publishers and distributors while he was in Northern Virginia on business. Nancy and Rogers maintained the household and cared for their children.

In November of 1992, Smith and petitioner were promoting petitioner's book in an attempt to get it distributed to bookstores nationwide, however their efforts were not proving successfully. Smith alleged that while he was still living in the home, he witnessed petitioner sexually abuse two of the group's children on several instances. Smith alleges that the first incident occurred shortly after Thanksgiving of 1992. One afternoon, Rogers asked Smith if he would hold her son Matthew while she did something somewhere else in the house. Smith agreed and began to walk with the infant through the house. Smith walked down a hallway and past the bedroom of Rogers' daughter, Rachel Borgenson. As Smith passed the doorway of the room, he saw Rachel, then approximately three and a half years old, naked and on her hands and knees. Smith claims that

petitioner was sitting cross-legged on the floor, fully clothed, licking and placing his tongue into Rachel's vagina. Smith walked past the room to the end of the hall, turned around, and walked back past the room a second time and claims to have seen the same thing. Smith did not confront petitioner about his behavior, nor did he tell Rogers or any other member of the group what he had allegedly seen.

Approximately one week later, Smith alleges that he went to petitioner's room to speak with him. As Smith approached the room, he claims that he saw Katina Stich, then approximately two years old, lying face up on petitioner's bed completely naked, with her legs spread open and folded back up on her chest. Smith claims that petitioner was sitting cross-legged on the floor licking and placing his tongue into Katina's vagina. Smith paused briefly at the door and then walked away. Smith did not confront petitioner nor did he tell anyone in the house what he had seen.

Approximately one week later, Smith claims he walked up the stairs of the house and saw petitioner standing at a changing table in an alcove in the second floor hallway. Smith alleges that Katina was lying on the changing table and the petitioner was putting his fingers inside of her vagina and stretching it back and forth. Smith claims that he paused long enough to realize what was happening and then walked away. Smith did not tell anyone what he had seen.

Smith moved out of the home abruptly on December 10, 1992 in the middle of the night. Thereafter, Smith occasionally returned to pick up furniture for his customers in Northern Virginia. Smith testified that on one of these trips, he told Nancy and Rogers what he had seen petitioner do the children. Smith also testified that he confronted petitioner about what he had seen. Smith claimed that petitioner did not deny his behavior, but responded by telling Smith that he believed it was okay for him to have sexual contact with his daughters and asked Smith not to divulge what he had seen.

After his conversation with petitioner, Smith returned infrequently. Smith testified that petitioner attempted to speak with him during several of his visits in order to persuade Smith that what he was doing with his daughters was God's will. In January of 1993, Smith claims to have had a conversation with his now wife, Dana, about the incidents of abuse which he had witnessed. Dana told Smith that she had also witnessed petitioner abuse Rachel. Dana alleged that in February of 1992, she saw Rachel sitting on the couch in the playroom with her nightgown pulled up above her waist, and saw petitioner holding Rachel's hand in his, rubbing the exterior of her vagina. The following month, in February of 1993, Smith and Dana reported the allegations of petitioner's abuse to the Virginia Department of Social Services (VDSS). Petitioner was arrested and the children were taken into protective custody.

Petitioner was convicted on two counts of sexual battery and two counts of sodomy of the children, Katina Stich and Rachel Borgenson. Petitioner was convicted primarily on the testimony of Timothy Smith and his wife Dana. At petitioner's criminal trial, the Commonwealth introduced the testimony of four witnesses. Timothy and Dana Smith both testified that they had observed petitioner sexually abusing the girls. Dr. Robert Karmy, an obstetrician and gynecologist, testified that he examined both girls and observed irregularities in the hymenal ring of Katina, but no irregularities in the hymenal ring of Rachel. He also stated that both children were cooperative with him during the examination, which he felt was unusual for children of that age. James Carrigan testified that when he confronted petitioner with Timothy Smith's allegations of sexual abuse, petitioner responded that he wasn't doing anything that God didn't condone.

Petitioner presented the testimony of eight witnesses and testified in his own defense. Petitioner called Nancy Stich and Jenny Roberts, the girls' mothers; Janet Bergdoll, a registered nurse; Susan Zacharias and Anthony Gebhardt,

friends of petitioner; Carroll Miller, a police officer; and Bill Garber, an investigator for the Department of Social Services. No doctor was called to testify in petitioner's defense. However, Dr. Frank Gearing, a pediatrician, and Dr. Roger Pasternak, a psychologist, have submitted affidavits stating that they were willing and able to testify that they had evaluated the girls and did not find evidence of abuse. Several witnesses have submitted affidavits stating that petitioner's trial counsel, William Allen, did not prepare them to testify at trial and that Mr. Allen did not investigate information they provided him regarding Tim Smith's reputation in the community.

Procedural History

Following his conviction on February 10, 1994, petitioner filed a petition for appeal with the Court of Appeals of Virginia which was denied on October 19, 1994. Stich filed a second petition for appeal with the Supreme Court of Virginia which was denied on March 20, 1995. On April 3, 1995, Stich filed a petition for writ of habeas corpus in the Circuit Court for Shenandoah County. In his state habeas petition, petitioner raised the same claims that he has raised in the petition presently before the court. The circuit court rejected Stich's petition without a hearing on January 24, 1996. The court issued an opinion letter indicating its reasons for denying Stich's petition.

The circuit court indicated that Dr. Frank Gearing intended to testify that Katina Stich had not been sexually abused. The court reasoned that the testimony of Dr. Gearing would have been barred by the rule of evidence prohibiting expert testimony about the ultimate fact in issue. In addition, the circuit court stated that Dr. Roger Pasternak's testimony would have been inadmissible. The court believed that Dr. Pasternak intended to testify about the credibility of Rachel Borgenson's statement that the

petitioner had not abused her. However, Rachel was not called to testify at Stich's criminal trial.

The court also addressed petitioner's claim that his trial counsel was ineffective for failing to discover the fact that Tim Smith had been convicted of a felony and for failing to cross-examine Smith about that conviction. The court reasoned that evidence of Smith's prior conviction would have been inadmissible because the conviction occurred approximately fifteen years prior to Stich's trial, when Smith was a juvenile.

Stich then filed a petition for appeal with Supreme Court of Virginia. The Supreme Court rejected Stich's petition on July 29, 1996. Petitioner filed the present petition on September 20, 1996.

Evidence Presented

As directed by the order of reference, the undersigned United States Magistrate Judge conducted an evidentiary hearing in this matter on July 24, 1997. At the hearing, the petitioner presented the testimony of ten witnesses and testified on his own behalf. The testimony of these witnesses is summarized as follows.

The petitioner called Dr. Frank gearing, III. Dr. Gearing practices pediatric medicine in Harrisonburg, Virginia and is an expert in the study of sexual abuse of children. Gearing testified that he was contacted by the Stich family after petitioner had been arrested on charges of child abuse. Gearing performed a physical examination of Katina Stich four months after the abuse allegedly occurred. His examination of Katina revealed no physical evidence of sexual abuse, contrary to the testimony that had been presented by the prosecution's medical expert at the petitioner's criminal trial. Specifically, Gearing found no bruises or abrasions on Katina's labia, no scarring between her vagina and rectum, and no physical characteristics suggestive of sexual abuse. However, Gearing stated that his

findings did not exclude the possibility that Katina had been sexually abused; he merely concluded that there was no physical evidence of abuse.

Gearing was asked to explain the discrepancy between his findings and those offered by Dr. Robert Karmy, the prosecution's medical expert. Karmy testified at trial that he had observed certain physical characteristics of Katina's hymen which he believed indicated that she had suffered some sort of physical trauma to her vaginal area, though he could not determine whether such trauma was sexual in nature. Karmy conceded that his medical practice with young girls was limited and that he was unfamiliar with medical literature discussing the significance of genital findings in young girls. At the evidentiary hearing, Gearing testified that the characteristics which Karmy had identified in his examination of Katina were more likely normal variants in the child's hymen and the Karmy was incorrect in concluding that the child might have suffered some sort of trauma. Gearing cited a recent medical journal article which supported his conclusion.

Gearing was also asked to explain why he did not testify at the petitioner's criminal trial. Gearing responded that he had been prepared to testify, but that he was not contacted by petitioner's attorney until the day before trial. Gearing explained that, at that point, he had gone on vacation with his family. William Allen, petitioner's attorney, obtained Gearing's phone number at his vacation home, called him, and asked him if he would testify at petitioner's trial the following day. Gearing stated that he declined Allen's request because of the short notice and because he did not want to leave his family or interrupt his vacation.

Dr. Pasternak, a licensed psychologist, also testified at the hearing. Pasternak has been in private practice for fifteen years, specializing in the evaluation and treatment of sexually abused children and individuals who have sexually abused children. Pasternak testified that the Stich family

contacted him in the spring of 1993 in order to schedule psychological evaluations of petitioner, Nancy Stich, Jenny Rogers, Katina, and Rachel pursuant to a court order. Pasternak testified that neither Katina or Rachel made any statements to him which he found to be consistent with sexual abuse. Pasternak noted that Katina was too young to communicate more specifically about her experiences. However, Pasternak testified that Rachel was able to speak about the allegations and that she vehemently denied that petitioner ever touched her or that she had told the VDSS agent that petitioner had touched her.

Pasternak also stated that he had been prepared to testify about his findings at petitioner's criminal trial. Pasternak asserted that Allen had contacted him prior to petitioner's trial and that Allen had informed him that he wished to call him as a witness. However, according to Pasternak, Allen never contacted him about the trial again. Nevertheless, Pasternak went to court on the date of petitioner's trial to see if he would be needed to testify. He was met by Allen on the courthouse steps and informed that he would not be needed to testify.

Petitioner also called his wife, Nancy Stich, Jenny Rogers, and his father, Lawrence Stich. Each of these witnesses testified about their interactions with petitioner's trial counsel and their role in the petitioner's defense. Nancy Stich and Rogers also testified about their knowledge and opinions of Tim Smith and the alleged abuse of their daughters. Lawrence Stich, a retired corporate attorney, testified that he hired Allen to represent his son at trial. Lawrence stated that, although he had never practiced criminal law, he remained very involved in his son's defense and spoke with his son's attorney throughout the course of the criminal proceedings. Lawrence testified that Allen consistently appeared unprepared and unorganized during the time leading up to petitioner's trial as well as during the trial. Lawrence stated that Allen appeared timid and uncertain of himself at trial. Finally, Lawrence stated that, at

the close of the trial, Allen stated that he "blew it" and had done a poor job representing the petitioner.

Nancy Stich and Rogers offered similar testimony regarding Allen's failure to prepare adequately for the petitioner's trial. For example, Nancy Stick noted that she and Rogers had been very involved in the preparation for petitioner's trial and that Allen never seemed to be very organized in his approach to developing the petitioner's defense. She testified that she and Rogers had compiled a list of ten individuals who could have testified about Tim Smith's poor reputation in the community and had given this list to Allen. Allen told Nancy Stich that he would contact the individuals, but he failed to do so. Nancy Stich also testified that she proposed to Allen that the family hire a private investigator to assist Allen in his investigation of petitioner's case, but that Allen rejected the suggestion. Both Nancy Stich and Rogers noted that Allen did little to prepare them to testify at petitioner's trial. Allen did not compile any specific questions to ask before the trial, nor did he perform mock questioning or cross-examination sessions.

Both women also identified several areas of inquiry which they believe should have been pursued during petitioner's trial. In particular, they testified that they wished they could have explained to the jury the nature of their religious beliefs and how their beliefs affected their living arrangements. They noted that Allen determined that neither the petitioner nor the two women should discuss their religious beliefs. Both women testified that, despite the unorthodox nature of their relationships with the petitioner, they were all extremely dedicated to creating a stable family environment in which to raise their children. Further, contrary to Smith's testimony at trial, neither they nor the petitioner believed that pedophilia was acceptable. In sum, the women believed that if they had been able to explain their religious theology and lifestyle choices more thoroughly, the jury would have viewed the petitioner in a more positive light.

Nancy Stich and Rogers also testified about Smith's credibility. Both women indicated that Smith had a terrible reputation for truth and honesty. They both mentioned the fact that Smith had been involved in several failed business ventures in and around Waynesboro. In addition, they both testified that Smith had bragged to them that he had robbed two banks.

Both women were asked whether they had ever noticed their daughters exhibit any behavior which might be suggestive of sexual abuse. Both stated adamantly that they had noticed no sudden changes in their daughter's behavior, no signs of depression, no reluctance to interact with the petitioner, and no change in their behavior toward the petitioner. In addition, they testified that it was rare that any adults in the group were ever alone with the children for a very long period of time. Thus, they found it unlikely that the petitioner could have abused any of the children without their having seen him.

Finally, Nancy Stich and Rogers were asked to speculate as to why Smith might have fabricated allegations of child abuse against the petitioner. Both women stated that the petitioner had acted as the spiritual leader of the group and that Smith was jealous of petitioner's role. The women also believed that Smith was jealous of the fact that petitioner had been successful in establishing an intimate relationship with two women. They testified that Smith had attempted to arrange a similar relationship by inviting a second woman to live with he and Dana Straw, but that Smith's efforts were unsuccessful. Finally, the women stated that they believed that Smith was interested in supporting petitioner's efforts to publish his book only because Smith believed that he might make money from the book's eventual distribution and sale. Thus, when Smith's efforts to promote the book failed, Smith became bitter toward the petitioner.

At the hearing, the petitioner called William Garber and Dr. Houston Miller to testify about Smith's poor

reputation for truth and honesty in the community. Garber testified about Smith's character at petitioner's criminal trial. However, his testimony was limited to stating that he was familiar with Smith's reputation in the community and that his reputation was not good. At the hearing, Garber explained in further detail his personal experiences with Smith and his reasons for distrusting him. Garber testified that he first met Smith when Smith came to live in a boys detention home in Waynesboro following his conviction in Charlottesville for bank robbery. Eventually, Smith convinced Garber to work with him in the furniture restoration business that Smith established after being released from the detention home. Garber worked with Smith for about five years until it was discovered that Smith had embezzled between $3,000 and $6,000 from the business. Recently, Garber discovered evidence that he believes indicated that Smith embezzled additional money from the business.

Dr. Houston Miller, a local state magistrate and dentist, also testified at the hearing that Smith's reputation in the community was poor. Miller did not testify at petitioner's trial, although he was one of the individuals whom Nancy Stich and Rogers had suggested Allen contact. Miller testified that he met Smith through the Mormon Church and that he co-signed a loan for Smith to pay a debt to the IRS. Smith failed to pay the loan, leaving Miller to make the payments on the note. Miller has made monthly payments of $1,400 for the last five years.

Finally, petitioner called several witnesses to testify about the quality of Allen's reputation. Thomas Vale, a recent law school graduate and paralegal, was hired by petitioner's habeas counsel to review Allen's file. Vale testified that Allen did not have a trial notebook. Nor did he have any organized notes regarding the trial or his examination of any of the witnesses. While the file contained approximately twenty pages of handwritten notes, the notes were not organized in any particular fashion.

Finally, Vale testified that he found a copy of only one legal opinion in the file. Other than for that opinion, Vale found no evidence in the file that Allen had ever conducted any legal research prior to petitioner's trial.

Peter Baskin, an experienced Virginia criminal attorney, also testified about Allen's representation of the petitioner. Baskin opined that Allen's representation of petitioner was constitutionally ineffective. Specifically, Baskin noted that Allen failed to adequately investigate the facts of the petitioner's case and call appropriate witnesses. For example, Baskin testified that Allen should have subpoenaed both Dr. Gearing and Dr. Pasternak to testify at petitioner's trial. He believed that their testimony would have sufficiently rebutted the testimony of the prosecution's medical expert.

Baskin also testified that Allen should have discovered Smith's previous felony conviction and that he should have attempted to use that information to impeach Smith's credibility after Smith stated in a preliminary hearing that he had no prior criminal record. Finally, Baskin noted that Allen should have attempted to call additional witnesses to testify to Smith's poor reputation in the community. However, Baskin conceded that such witnesses would not have been permitted to relate any specific incidents and that the trial judge may have limited the number of such witnesses petitioner was permitted to call. Alternatively, Baskin asserted that Allen should have at least spoken with each of the witnesses identified by the petitioner and determined which witnesses would have most effectively diminished Smith's credibility.

Baskin also testified that he believed Allen's efforts in preparing for the trial and his organization of materials were completely inadequate. Specifically, Baskin testified that Allen should have at least produced an outline of the questions he intended to ask each of his witnesses, as well as the topics he wished to cover during the cross-examination of the prosecution's witnesses. Further, Baskin proffered

that Allen should have discussed the questions he intended to pose to his own witnesses well in advance of the trial and should have practiced questioning these witnesses in order to make them more comfortable on the stand. Finally, Baskin stated that Allen should have anticipated many of the objections made by the prosecution and should have been better prepared to argue against the objections and present the court with legal support for his arguments.

William Allen, petitioner's trial counsel, testified about his representations of the plaintiff. Allen admitted that he was not proud of his performance and conceded that he made several errors during the trial. In particular, Allen admitted that he should have subpoenaed Dr. Gearing to testify and rebut the testimony of the prosecution's medical expert. However, Allen felt that he was successful in undermining Karmy's credibility inasmuch as he succeeded in getting Karmy to admit that he was not an expert in pediatric gynecology and that he was probably not well-suited to offer expert testimony in petitioner's case. Allen also admitted that he was intimidated by the trial judge and that this compromised his representation of the petitioner. Allen conceded that evidence of Smith's prior felony conviction would have been useful, but maintained that he requested that information from the prosecution prior to the trial and the prosecution had not disclosed the conviction. Allen also related that he had not read the petitioner's book and was not familiar with petitioner's religious beliefs. Accordingly, he was not able to refute Smith's testimony about the petitioner's religious beliefs.

Despite having conceded that he made numerous errors during petitioner's trial, Allen defended some of his efforts. In particular, Allen testified that he had prepared adequately for petitioner's trial. He also noted that it was not his practice to prepare a trial notebook for any of his cases. Similarly, he does not believe in composing specific questions to ask witnesses prior to questioning them in court. Allen stated that he made the decision to avoid discussing

the group's religious beliefs at trial because he believed that the prosecution would use the beliefs to paint petitioner, Nancy Stich, and Rogers as religious extremists. Allen was asked why he instructed petitioner to appear in court with a full beard, mustache, and long hair. He responded that he had hoped to use the beard to prove that it would have been impossible for Smith to have seen petitioner perform the acts which Smith alleged he performed because petitioner's beard would have obstructed Smith's view of petitioner's mouth. Allen admitted, however, that he forgot to raise this argument at trial.

Finally, petitioner testified on his own behalf. Petitioner stated that prior to the trial he had provided Allen with information regarding potential witnesses and Smith's dishonesty, but that Allen never followed up on any of that information. Petitioner also indicated that Allen did little to prepare him for trial. In particular, Allen did not discuss petitioner's testimony in any detail prior to the trial, nor did Allen prepare him for cross-examination by the prosecution.

Petitioner testified that he believed that Smith fabricated the charges against him because Smith had become disillusioned with both petitioner and petitioner's book. In particular, petitioner stated that approximately three weeks before Smith filed charges with the VDSS, Smith accused him and the book of being evil and stated that he wanted to destroy petitioner, his family, and the book. Petitioner noted that this information was never brought out at trial.

Statement of Applicable Law

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 (1996). The AEDPA amended several portions of 28 U.S.C. §2254, the statute which sets out the procedures governing the review by federal courts of petitions for writ of habeas corpus. One

such change effectuated by the new law involves the appropriate standard of review to be applied by federal courts when reviewing claims brought in a habeas petition. Prior to the passage of the AEDPA, federal courts were not required to defer to the prior determinations of state courts but, rather, could engage in de novo review of claims raised in petitions for writ of habeas corpus, subject to certain codified statutory exceptions. See Brown v. Allen, 344 U.S> 443 (1953). The AEDPA abrogated the de novo review standard, however, and replaced it with the following new standards:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 1997). Thus, as long as the determinations of the state court were reasonable, a federal reviewing court must defer to such determinations and dismiss the petition. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996).

The Sixth and Fourteenth Amendments protect a criminal defendant's right to effective assistance of counsel at trial. To demonstrate that this right has been denied, a petitioner must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 669 (1984). First, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. Id. At 688. In determining whether petitioner has made this showing, a reviewing court must give great deference to counsel's tactical decisions because there is a strong presumption that counsel's conduct was within the wide range of objectively reasonable assistance. Id, at 688-89. Reviewing courts as a general rule are reluctant to assume the task of second-guessing the tactics of defense attorneys. Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977). Second, the petitioner must demonstrate that he suffered prejudice as a result of his attorney's error. Specifically, he must show that, but for counsel's errors, there was a reasonable probability that the result of his trial would have been different. Strickland, 466 U.S. at 694. A reasonable probability is one which undermines confidence in the outcome of the trial. Ibid.

The failure by an attorney to conduct a reasonable investigation or to make a reasonable decision regarding the necessity of a potential investigation can constitute ineffective assistance. See Strickland v. Washington, 466 U.S. 688 (1984). However, allegations that trial counsel conducted an inadequate investigation will not warrant relief absent a proffer of the favorable evidence or testimony that would have been produced by such an investigation. See Bassette v. Thompson, 915 F.2d 932, 940-41 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991).

It has not been conclusively determined by the Court of Appeals for the Fourth Circuit whether a reviewing court can consider the cumulative effect of multiple counsel errors in determining whether the prejudice prong of Strickland has been satisfied. The Fourth Circuit has upheld the denial of a

writ of habeas corpus over a vigorous dissent which argued that the court should consider the cumulative effect of counsel errors. See Hoots v. Allsbrook, 785 F.2d 1214 (1986) (Ervin, J., dissenting); See also Briley v. Bass, 584 F.Supp. 807, 845-46 (E.D. Va.), aff'd, 742 F.2d 155 (4th Cir.), cert. denied, 105 S.Ct. 270 (1984). However, the court has also upheld the denial of a writ of habeas corpus after noting that petitioner argued for cumulative error review and stating that "viewing the evidence as a whole, including any errors, our confidence in the outcome of the trial remains undisturbed." Hyffman v. Nuth, 1998 WL 142317 (4th Cir. 1998) (the Court cites Williams v. Armontrout, 912 F.2d 924, 934 (8th Cir. 1990) stating that the Eighth Circuit evaluated the cumulative effects of asserted errors. However, in later cases, the Eighth Circuit explicitly rejected cumulative error review. See, e.g., Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996)).

Findings of Fact, Conclusions of Law, and Recommended Disposition

1. The undersigned finds that, at the time he filed this habeas petition, Joseph P. Stich was in custody pursuant to his convictions under state law and the he seeks relief from his criminal convictions in the Circuit Court for Shenandoah County, a state court located within the Western District of Virginia. Accordingly, the undersigned concludes that this court has jurisdiction to adjudicate the petitioner's claims, see 28 U.S.C. §2254, and that venue is proper.

2. Based on a review of the record and the oral stipulation of counsel during the evidentiary hearing conducted in this matter on July 24, 1997, the undersigned finds that the petitioner has exhausted all ineffective assistance of counsel claims raised in the petition for writ of habeas corpus presently before the court. The Circuit Court of Shenandoah County relied on Strickland in dismissing petitioner's claims after evaluating them on the merits. The

circuit court explained it's reasoning in an opinion letter. The Supreme Court of Virginia refused Stich's petition for appeal, implicitly adopting the circuit court's decision. Accordingly, the undersigned will review the state habeas court's disposition of these claims to determine whether the state court acted "reasonably" as required by the standard of review established by AEDPA. See 28 U.S.C. 2254(d).

To prevail on a claim of ineffective assistance of counsel, petitioner must first show that his counsel's representation fell below an objective standard of reasonableness. Petitioner must then show that he suffered prejudice as a result of his counsel's error. Specifically, petitioner must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. Strickland, supra.

3. As a preliminary matter, the undersigned notes that petitioner argues that the court should consider the cumulative effect of counsel's alleged errors or the totality of counsel's ineffectiveness. Respondent asserts that errors committed by an attorney that do not meet the two part test of Strickland individually cannot meet this test by being considered in combination with all of the errors.

Petitioner primarily relies on Strickland and Kyles v. Whitley, 115 S.Ct. 1555 (1995). In Strickland, the Court used the plural "errors" in setting out the standard for ineffective assistance of counsel, stating that a petitioner must show that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. In Kyles, the Supreme Court evaluated a petitioner's claims under Brady v. Maryland, 373 U.S. 83 (1963), by reference to the cumulative effect of all non-disclosed evidence and equated the standard for "materiality" under Brady with the prejudice standard of Strickland. 115 S. Ct. 1560-67.

The Court of Appeals for the Eighth Circuit has explicitly rejected petitioner's argument stating "we reject cumulative error as a basis of relief.... Each habeas claim

must stand or fall on it's own." Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996), citing Warton-El v. Nix, 38 F.3d 372 (8th Cir. 1994) and Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991), cert. denied, 115 S.Ct. 1981 (1995).

However, a number of other federal circuit courts have held that it is proper to consider the cumulative effect of multiple errors. The Sixth Circuit has held that the court may look to whether the cumulative effect of attorney error was such that petitioner was denied fundamental fairness. Cooper v. Sowders, 837 F.2d 284 (6th Cir. 1988); See also Lundy v. Campbell, 888 F.2d 467 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990). The Tenth Circuit has held that cumulative error analysis is proper in evaluating the effect of representation determined to be in error, but not the cumulative effect of non-errors. Hoxsie v. Kerby, 108 F.3d 1239 (10th Cir. 1997), cert. denied, 118 S.Ct. 126 (1997), citing United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990). The Fifth Circuit has also approved of the cumulative review of attorney error when the errors were so egregious as to violate a defendant's right to due process. See Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (en banc), cert. denied, 113 S.Ct. 2928 (1993). The Ninth Circuit has considered attorney errors cumulatively in evaluating whether a petitioner met the prejudice prong of Strickland. See United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996); see also Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995); Mark v. Blodgett, 970 F.2d 614 (9th Cir. 1992), cert. denied, 113 S.Ct. 1363 (1993). Finally, the Seventh Circuit has held that the cumulative effect of individual acts or omissions may be substantial enough to satisfy the Strickland test. United States ex rel. Kleba v. McGinnis, 796 F.2d 947, 958 (1986), citing Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984), cert. denied, 469 U.S. 1226 (1985).

It has been conclusively determined by the Court of Appeals for the Fourth Circuit whether a reviewing court can consider the cumulative effect of multiple counsel errors in determining whether the prejudice prong of Strickland has

been satisfied. The Fourth Circuit has upheld the denial of a writ of habeas corpus over a vigorous dissent which argued that the court should consider the cumulative effect of counsel errors. Hoots, supra; See also Briley, supra. However, in a later case, the Fourth Circuit considered petitioner's argument that the court should perform cumulative error review and stated that "viewing the evidence as a whole, including any errors, our confidence in the outcome of the trial remains undisturbed." Huffington, supra at *11.

As the foregoing analysis indicated, neither the Supreme Court nor the Fourth Circuit has ever expressly supported one interpretation of Strickland over the other. Nevertheless, the undersigned believes that the overall effectiveness of an attorney is far too subjective and tenuous a test for a meaningful evaluation of whether petitioner received competent assistance under the Sixth Amendment. Under petitioner's theory, a federal court must construct a hypothetical of what would have happened had petitioner been represented by an entirely different attorney. Petitioner is correct in asserting that, under such circumstances, the outcome of the trial may have been different, but it is impossible to say whether there is a reasonable probability that it would have been different.

The undersigned interprets Strickland to require petitioner to point to specific deficiencies in his attorneys conduct and to establish prejudice resulting from one or more of these deficiencies standing alone. It is true that by evaluating each of the deficiencies to which petitioner points in the context of the trial as it actually occurred, the court makes an implicit determination that an attorney's overall performance was not inadequate. However, the undersigned believes that Strickland dictates this approach to the evaluation of multiple claims of ineffective assistance of counsel rather than requiring the court to determine the outcome of a hypothetical criminal trial. Accordingly, the undersigned declines to evaluate the cumulative effect of the

errors alleged by petitioner in determining whether petitioner has satisfied the two-prong test established by Strickland. The undersigned will now address each of petitioner's claims individually.

3. In his first claim, petitioner asserts that his counsel was ineffective for failing to investigate and discover evidence of Timothy Smith's prior felony conviction and for failing to adequately impeach Smith's testimony. The state habeas court found that petitioner's counsel was not ineffective stating the following:

> Had Stich offered Smith's prior criminal record for impeachment purposes and the Commonwealth objected, the Court would have sustained the objection.... Smith's juvenile conviction was in 1978, approximately fifteen years before Stich's jury trial and therefore inadmissible for impeachment purposes. See Scott v. Commonwealth, 7 Va. App. 252 (1988), cert. denied 490 U.S. 1095 (1989)], Fulcher v. Commonwealth, 226 Va. 96 (1983) and Davis v. Alaska, 415 U.S. 308 (1974).

The state habeas court's reasoning is consistent with the Virginia Court of Appeals holding in Scott. In Scott, a defendant seeking to mount a general attack of the credibility of a witness for the Commonwealth was not permitted to cross-examine the witness with his juvenile adjudication for assault. 7 Va. App. 252 (1988). Inasmuch as the law in Virginia prevented petitioner's counsel from introducing evidence of Smith's prior conviction at trial, the undersigned concludes that counsel was not ineffective for failing to more thoroughly investigate Smith's juvenile criminal activities. Furthermore, inasmuch as the judge who presided at petitioner's trial stated that he would not have allowed the evidence to be admitted, the undersigned concludes that

petitioner has not satisfied the prejudice prong of Strickland. Petitioner has not shown that, but for counsel's alleged errors, the outcome of the trial would have been different. Accordingly, the undersigned concludes that the state habeas court's decision was reasonable and that this part of petitioner's claim must be dismissed. See 28 U.S.C. §2254, supra.

4. Petitioner also asserts in his first claim that his counsel was ineffective for failing to impeach Smith's testimony. At the evidentiary hearing, petitioner argued that counsel could have questioned William Garber, the one character witness called to testify at petitioner's criminal trial, about specific personal and business experiences with the petitioner. The state habeas court noted in its opinion letter that Virginia law precluded petitioner's counsel from eliciting testimony of specific examples of Smith's conduct. In Virginia, it is well settled that the character of a witness can be impeached by eliciting testimony that the witness' reputations for truth and veracity in his community is poor. See Bradley v. Commonwealth, 196 Va. 1126 (1955). However, the testimony of an impeaching witness must be confined to the general reputation of the witness. Testimony as to specific acts of bad conduct is not permitted, even if the acts have a bearing on the veracity of the witness. See Clark v. Commonwealth, 202 Va. 787 (1961); Weimer v. Commonwealth, 5 Va. App. 57 (1987).

Inasmuch as Virginia law precluded questions about Smith's bad acts, the undersigned concludes that counsel was not ineffective for failing to ask Garber questions about his specific dealings with Smith. Furthermore, the trial judge stated that he would not have permitted testimony about specific examples of Smith's poor conduct. Thus, the undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland. Petitioner has alleged no facts to indicated that, but for counsel's alleged errors in failing to attempt to elicit testimony from Garber regarding Smith's conduct, there is a reasonable probability that the outcome of

the trial would have been different. Accordingly, the undersigned concludes that the state habeas court's decision was reasonable and that this part of petitioner's claim must be dismissed. See, 28 U.S.C. §2254(d), supra.

5. In his second claim, petitioner asserts that his counsel was ineffective for failing to subpoena critical witnesses. Specifically, petitioner identifies two groups of witnesses: (1) individuals aware of Tim Smith's poor reputation for truth and honesty in the community, and (2) the doctors who examined Katina and Rachel, Dr. Gearing and Dr. Pasternak.

5(a). Petitioner first alleges that his counsel was ineffective for failing to subpoena additional witnesses to testify about Smith's poor reputation and character. At the evidentiary hearing, petitioner argued that counsel could have called other witnesses to testify about their personal and business dealings with Smith. As discussed above, Virginia law precluded counsel from calling witnesses to testify as to specific conduct by Smith. Accordingly, the undersigned concludes that trial counsel was not ineffective in this regard.

Petitioner also asserts that counsel should have subpoenaed additional witnesses to testify that Smith had a poor reputation for truth and veracity in the community. The undersigned finds it unlikely that the trial judge would have permitted counsel to call more than two or three such witnesses. In addition, these witnesses would only have been able to echo the testimony of William Garber. The undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland as he has not shown that, but for counsel's failure to call additional character witnesses, the outcome of the trial would have been different. Accordingly, the undersigned concludes that state habeas court's decision was reasonable and that this aspect of petitioner's second claim must be dismissed. See, 28 U.S.C. §2254(d), supra.

5(b). Petitioner also alleges that trial counsel was ineffective for failing to subpoena Dr. Gearing and Dr.

Pasternak to testify at petitioner's criminal trial. The court will address the claim related to the testimony of the two doctors separately.

5(b)(1). The state habeas court held that even if Dr. Gearing had been subpoenaed, his testimony would not have been admissible. The state court relied on principles of Virginia law which precluded an expert witness from testifying as to the ultimate fact in issue. See Jenkins v. Commonwealth, 492 S.E.2d 131 (1997). The court stated that Dr. Gearing would have testified that Katina Stich had not been sexually abused and that inasmuch as this was the ultimate fact in issue in the trial, his testimony would not have been admissible.[1] The state habeas court dismissed the claim after finding that this testimony would have been inadmissible at trial. Given Dr. Gearing's testimony at the evidentiary hearing before this court, the undersigned concludes that the circuit court's characterization of Dr. Gearing's expert opinion was incorrect. Accordingly, the undersigned concludes that the state habeas court's dismissal of this claim was unreasonable and thus the undersigned will address this claim on the merits. See, 28 U.S.C. §2254(d), supra.

At the evidentiary hearing, Dr. Gearing stated that he was prepared to testify that he examined Katina and observed no evidence of sexual abuse. In addition, Dr. Gearing would have testified that the characteristics which Karmy had identified in his examination of Katina were more likely normal variants in the child's hymen and that Karmy was incorrect in concluding that the child might have suffered some sort of trauma. Gearing cited a recent medical journal article which supported his conclusion. Contrary to the state habeas court's assessment of Dr. Gearing's opinion,

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[1] The court reasoned that Dr. Karmy's testimony was admissible because he did not testify that Katina had been sexually abused, but rather than she suffered a trauma to her vagina that could have come from a number of sources.

the undersigned finds that Dr. Gearing's testimony would have been admissible because Gearing would not have testified as to whether Katina had been sexually abused, but rather would have testified as to the result of his examination. Stated differently, he would have testified that he observed no physical signs consistent with trauma. The undersigned concludes that petitioner's counsel was ineffective for failing to subpoena Dr. Gearing.

However, to prevail on a claim of ineffective assistance of counsel, petitioner must also satisfy the prejudice prong of Strickland. Dr. Gearing did not testify at the evidentiary hearing that he would have opined that Katina had not been sexually abused. Even if he would have been willing to so testify, such testimony would have been inadmissible under Virginia law. See Jenkins, supra. Gearing testified only that he did not observe evidence consistent with sexual abuse. Dr. Karmy testified that his examination yielded observations to the contrary. Gearing was not asked whether the physical condition of Katina's vagina was inconsistent with the testimony of Tim Smith.[2] While Gearing's testimony may have neutralized the testimony of the Commonwealth's expert, neither physician

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[2] Smith testified that on one occasion he saw petitioner insert his tongue into Katina's vagina and that on another occasion he saw petitioner insert his fingers into Katina's vagina and stretch it back and forth. Petitioner's habeas counsel argued in his closing statement at the evidentiary hearing the Dr. Gearing would have testified that, if events had occurred as alleged by Smith, the children would have exhibited physical symptoms of the abuse. However, counsel conceded that he did not ask Dr. Gearing if that would have been his testimony. Nor has counsel submitted a supplemental affidavit from Dr. Gearing stating that he would have testified that Smith's allegations were inconsistent with the results of his examination. The court cannot rely on counsel's argument as to what Dr. Gearing would have testified, especially considering the fact that Dr. Gearing was present at the evidentiary hearing for the sole purpose of informing the court as to what his testimony would have been had he been called as an expert at petitioner's trial.

could offer any opinion as to whether the girls had been sexually abused. The eyewitness testimony, and that of the witness to whom petitioner made a seemingly incriminating statement, would not have been undercut by Gearing's testimony. As noted by petitioner's legal expert at the evidentiary hearing, the medical evidence was not dispositive in this case. Accordingly, the undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland. Petitioner has not presented facts to show that, had Dr. Gearing testified, the outcome of the trial would have been different. Accordingly, the undersigned concludes that this claim must be dismissed.

5(b)(2). The state habeas court held that had petitioner's counsel called Dr. Pasternak to testify, his testimony would have been ruled inadmissible. The undersigned agrees with the circuit court's determination. Dr. Pasternak, a psychologist, examined both girls and was willing to testify that Rachel told him that petitioner did not abuse her. The only way Dr. Pasternak would have been allowed to testify would have been to impeach the testimony of Rachel had she testified at trial that petitioner had abused her. Since Rachel did not testify, Dr. Pasternak's testimony would have been inadmissible hearsay. See Jenkins v. Commonwealth, 492 S.E.2d 131 (1997) (psychologist not permitted to testify that child told him that he had been "sexed."). However, Rachel did not testify at trial and thus the undersigned concludes that counsel was not ineffective for failing to subpoena Dr. Pasternak.

Furthermore, even assuming counsel should have called Dr. Pasternak, the undersigned concludes that petitioner has failed to allege sufficient facts to satisfy the prejudice prong of Strickland. The most Dr. Pasternak could have offered was that Rachel told him that petitioner had never abused her. The undersigned does not believe that the statement of a child as to what had happened to her when she was three and a half years old would have been given much weight by the jury, especially in light of the testimony by

two adult eyewitnesses. The undersigned concludes that petitioner has not alleged sufficient facts to indicate that, but for counsel's failure to call Dr. Pasternak, the outcome of the trial would have been different. Accordingly, the undersigned concludes that the state habeas court's determination was reasonable and that this claim must be dismissed. See 28 U.S.C. §2254(d), supra.

6. In his third claim, petitioner asserts that his trial counsel was ineffective for failing to adequately prepare petitioner and the defense witnesses for trial. The state court dismissed this claim citing Strickland, supra. Nancy Stich, Jenny Rogers, and petitioner testified at the evidentiary hearing that petitioner's counsel did very little to prepare them to testify at trial. Petitioner also stated that counsel did not discuss his testimony with him in detail prior to trial and did not prepare him for cross-examination. Thomas Vale, a paralegal who reviewed counsel's file, testified that counsel did not appear to have any organized notes regarding the examination of any of the witnesses. Peter Baskin, an experienced criminal attorney, testified that counsel should have at least produced an outline of questions he intended to ask each witness and that he should have discussed the questions with his witnesses and practiced questioning the witnesses to make them more comfortable on the stand.

The undersigned finds that counsel may have done a poor job preparing petitioner and the defense witnesses for trial and thus may have been constitutionally ineffective. However, even assuming that counsel was constitutionally ineffective, the undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland. Petitioner has not alleged sufficient facts to indicate that, had counsel properly prepared petitioner and the defense witnesses for trial, the outcome of the trial would have been different. In dismissing this claim during the state habeas proceeding, the circuit court judge who presided at petitioner's criminal trial stated that the defense witnesses were "thorough and articulate in presenting their testimony." The petitioner has

not identified what testimony counsel failed to elicit at trial, nor how that testimony would have changed the outcome of his trial. See Strickland, supra. Accordingly, the undersigned concludes that the state habeas court's decision was reasonable and that this claim must be dismissed. See 28 U.S.C. §2254(d), supra.

7. In his fourth claim, petitioner asserts that his counsel was ineffective for failing to adequately research legal issues relevant to the petitioner's defense. The state court dismissed this claim under Strickland, supra. Vale testified at the evidentiary hearing that his review of counsel's file revealed a copy of only one legal opinion and no evidence that any other legal research had been conducted. Baskin testified that counsel should have been better prepared to support his arguments at trial with legal authority.

The undersigned believes that counsel may have done a poor job researching legal issues that were likely to arise at trial and thus may have been constitutionally ineffective. However, even assuming that counsel was constitutionally ineffective, the undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland as he has not alleged sufficient facts to indicate that, had counsel performed additional legal research, the outcome of the trial would have been different. Accordingly, the undersigned concludes that the state habeas court's decision was reasonable and that this claim must be dismissed. See 28 U.S.C. §2254(d), supra.

8. In his fifth claim, petitioner asserts that his counsel was ineffective for failing to read petitioner's book prior to trial. Counsel conceded at the evidentiary hearing that he had not read petitioner's book before trial. Upon review of the trial transcript, the undersigned notes that the only prosecution witness to testify about the teachings of petitioner's book was Tim Smith. Smith asserted at trial that petitioner condoned pedophilia in the book. Petitioner argues that if his counsel had read petitioner's book, counsel

could have more effectively cross-examined Smith. According to petitioner, counsel could have asked Smith to point out those portions in the book in which petitioner condones pedophilia as well as confronting Smith with the fact that he wrote a glowing foreword for the book.

The undersigned finds that petitioner's trial counsel afforded ineffective representation by failing to become more familiar with petitioner's religious teachings. However, the undersigned concludes that petitioner has not satisfied the prejudice prong of Strickland as he has not alleged sufficient facts to indicate that , had counsel read petitioner's book, the outcome of the trial would have been different. The undersigned notes that while Smith was the prosecution's chief witness, his references to petitioner's book represented only a small portion of his testimony at trial. Moreover, though his comments were admittedly damaging to the petitioner, the undersigned does not find those comments to have been so independently inculpatory as to have altered the outcome of petitioner's trial. Smith offer ' eyewitness testimony of child abuse. This testimony was corroborated by another eyewitness and indirectly corroborated by yet another witness. The undersigned concludes that the petitioner did not suffer prejudice as a result of counsel's failure to read his book and his resulting inability to rebut Smith's comments about the book's teachings. Accordingly, the undersigned concludes that the state habeas court's decision was reasonable and that this claim must be dismissed. See 28 U.S.C. §2254(d), supra.

9. In sum, for the reasons stated, the undersigned finds that the errors committed by petitioner's trial counsel, considered individually, did not deprive petitioner of effective representation at trial.[3] Accordingly, based upon the foregoing findings of fact and conclusions of law, the

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[3] The undersigned notes that in this case, if petitioner's counsel's errors were considered cumulatively, it is possible that the undersigned's recommended disposition would be different

undersigned recommends that the court grant the respondent's motion to dismiss.

Both sides are reminded that they are entitled to note objections to this Report and Recommendation within ten (10) days of the date of its service. Both sides are advised that failure to file objections to the proposed findings of fact, conclusions of law, and recommendations set forth in this report within ten (10) days of the date of its service may be construed so as to bar an aggrieved party from attacking the factual findings on appeal. At the conclusion of the ten (10) day period, the Clerk is directed to transmit the record in this case to United States District Judge James C. Turk. The clerk is also directed to send certified copies of this Report and Recommendation to counsel of record for the parties.

Respectfully submitted,
This 3rd day of April, 1998.

/s/Glen E. Conrad
United States Magistrate Judge